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THE CLASH BETWEEN INTERESTS - BIAS AND PREDETERMINATION IN DECISION MAKERS

Research Paper for Administrative Law
LL.M. (Laws 501)

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Wellington
1985

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A. Introduction

> "In a sense, conflict of interest is a luxury issue - a matter that only an otherwise secure and established society can afford to worry about. Only when grosser larcenies in government have been reduced to tolerable limits, only when overt venality is uncommon enough to shock, is it possible for government to concentrate on potentials for evil and try and head off corruption at its sources. In a backhanded way, it is a tribute to the general moral health of government today that headlines can be made of potential evil."
>
> Bar Association of the City of New York [1]

This paper examines the impact of interest on the actions of a range of officeholders. The 'clash between interests' addresses those situations where the duty of an officeholder to act according to the deliberate result of his judgement and conscience is influenced by his private interests or by predetermination of the issue in dispute. The terms "interest" abd "bias" will be frequently used and are in need of definition. "Interest", in this context, means having a personal concern with regard to the participants in or subject matter of a particular dispute. This concern can stem from any number of factors and may include financial interests, personal relationships or, more generally, ideologies and inclinations. It is as a result of such interests that bias can ensue. "Bias" is a predisposition to decide a cause or an issue in a certain way which does not leave one's mind perfectly open to conviction. It results in an inability to exercise one's functions impartially in a particular case.

In evaluating the impact of these interests and the various ways the legal system seeks to regulate conflicts of interest, a number of variables must be considered. These are: The types of interest that might conflict, the types of 'actors' or decision makers, the types of powers these decision makers can exercise and the possible responses of the law. These variables serve to illustrate that there can be no one answer to any question as to what constitutes interest, nor can there be any one means to regulate such interest if it is found to exsist. Any potential solution is very much dependant upon the circumstances of the particular case.

1. <u>The Types of Interest</u>

(a) The most personal and venal level of interest is bribery and corruption. 'Bribe' means any money, valuable consideration, office, employment or benefit acquired by an officeholder in his official capacity. [2] The consequence is immediately apparant: A preconceived bias that will result in a failure to consider a case upon it's merits. This is one of the few forms of interest of which it can be said that a bias will automatically follow.

(b) A personal interest in the subject matter for adjudication or decision. This may take the form of a pecuniary interest in the subject matter. Thus, a substantial shareholding in a company which is a litigant in dispute or an applicant for a development may cause an officeholder to take irrelevant considerations into account when reaching his decision. The same result will follow if a litigant or applicant is related to an officeholder or is a personal friend. Alternatively, an officeholder may have openly displayed a degree of hostility towards a litigant, applicant,

or towards the subject matter of a dispute. Again, the officeholder may be rendered incapable of exercising independent judgement.

(c) An attitude towards the issue. This may take the form of an interest in an intemporance society on the part of a licencing justice or an interest in the protection of animals from cruelty on the part of a judge hearing a case of mistreatment. The interest in these cases is of a more general nature and may not always result in pre-judgement of a case.

(d) An interest in the outcome of proceedings. Impropriety will naturally be assumed if an officeholder has something to gain from the outcome of his decision. Thus, a judge who is a member of the company that has issued a summons may be prevented from hearing the matter. On a different level, ulterior motives might be supposed on the part of a Minister proposing an urban renewal scheme for the area in which his own house is located.

(e) A judge may act as a prosecutor and adjudicator in the same case. A disciplinary tribunal may, of its own motivation, conduct investigations into the conduct of a member of it's profession and, having already predetermined that member's guilt, go ahead and adjudicate upon the matter. This dual role is sometimes expressley condoned by Parliament. An example is provided by the Australian Ombudsman Act 1976. The Ombudsman may investigate a matter and, having decided

that proceedings are warranted, go ahead and prosecute the case before the Administrative Appeals Tribunal.

(f) Appellate bias. A judge at first instance may proceed to hear the same case on appeal. This question arises more frequently in non-statutory clubs and tribunals. A member of a governing body's sub-committee, which has already given a ruling as to an appellant's guilt, may sit also as a member of the governing body itself upon hearing the appeal.

(g) At a lesser level is a type of interest that arises, not from any personal or voluntary act on the part of an officeholder, but out of the very nature of the body of which he is a member. It is often the case that a member of a local authority will have spent some considerable time negotiating for and planning a particular development. Having a proposal firmly in his mind, his office requires him to hear objections to that proposal with an open mind. Similarly, a Minister may be required, by statute, to hear objections to his own provisional decision. Given the inevitable nature of this prior involvement with the subject matter of a case, the rules against bias must be adjusted accordingly.

The interest identified in paragraphs (a) to (f) are mostly preventable by the officeholder himself and may render him liable to penalty or public reprimand. The type of interest identified in paragraph (g) is preventable by the legislature or drafters of a body's constitution. The interest will not reflect adversely on the officeholder's own integrity, but will be the subject of

criticism on the part of the legislators or framers of the body's constitution.

2. The Types of Actors or Decision Makers

The officeholders with which this paper is concerned are:

- Judges and Justices of the Peace
- Members of statutory tribunals
- Members of non-statutory, or 'consensual', tribunals and arbitrators.
- Members of local authorities
- Members of Parliament
- Ministers of the Crown

The courts are conspicuously structured to demonstrate their object of impersonal justice and their detatchment from the personalities of the combatants. The ostensible, sometimes ostentatious adherence to an impersonal 'law', the removal of the judge to an aloof position above the struggle, all conduce to an air of impartiality. This impartiality is heightened by the process for a judge's appointment. Although the Judicature Act 1908 provides only that judges are to be appointed by the Governor-General, in practice the appointment is made upon the recommendation of the Prime Minister in the case of the Chief Jusitce and, for the remaining judges of the High Court and Court of Appeal and for District Court Judges, the appointment is made upon the recommendation of the Attorney-General. Consultation is normally sought from the Chief Justice, the Solicitor-General, the Secretary for Justice and from the President of the New Zealand Law Society.

The statutory tribunal is a creature of government, designed to deal exclusively with a particular area of adjudication. These areas are many. Some examples of the multitude are: Trades and professions, land and property, taxation and prices, salaries and conditions of employment, race and equality, penal matters, social security claims or more specialised matters such as abortion, censorship and deportation. The nature of a statutory tribuanl is often very much akin to that of a court: The function of the Small Claims Tribunal is to bring parties to a dispute to an agreed settlement. The Broadcasting Tribunal hears allegations brought by a complainant against a broadcaster. The disciplinary body of a profession will hear an allegation brought against a particular member of that profession and bodies such as Licencing Committees and the Motor Vehicle Salesmen Registration Authority will hear the applicant and any number of objectors who might be present at the hearing. In these ways, opposing parties will present their cases to an independent adjudicator in much the same way as is true of a court of law. Some statutory tribunals, however, are of a wholly different nature. There may only be one litigant, as it is often the case before the Taxation Review Authority. [3] or the Release to Work Committee [4], the functions of the tribunal may be, not to determine the rights of opposed litigants, but to determine the rights of classes of persons. This is true of tribunals dealing with matters relating to salaries and conditiions of employment. Alternately, the tribunal may not adjudicate upon the rights of any persons at all but may only act in an advisory capacity - as is the case with the Hotel Investment Account Advisory Committee. [5]

Members of statutory tribunals are usually appointed by the Governor-General on the recommendation of the Minister whose department is responsible for the particular tribunal. Often, there is provision for some input in the appointment process by an organisation who will be particularly affected by the area of the tribunal's jurisdiction. Because some members are appointed from organisations upon who they will adjudicate, they are not divorced from but are affiliated to the subjects and subject matter for adjudication.

We move further away from the icy impartiality of a court with domestic or 'consensual' tribunals. These tribunals are primarily concerned with the administration of internal discipline within bodies such as educational institutions, trade unions, clubs and professional associations. The term 'consensual' is often used to depict the voluntary nature of a member's action in joining the association, thereby voluntarily accepting the jurisdiction of the association's governing body. It may be the case, however, that such consensualism is a myth; that a member has no choice but to so submit himself if he wants to join the association in question. The unequal bargaining powers of the prospective member and the governing body heightens the argument that, as is the case with the courts of law, the jurisdiction of a particular governing body cannot be avoided if membership of the association is sought.

Members of these tribunals or disciplinary bodies are normally elected by the members of the organisation as a whole. In this way, they are not removed from the persons upon who they will adjudicate but will often be familiar with the issues and the

conduct of the parties involved in a dispute before they assume their role as adjudicators.

A purely consensual decision maker is an arbitrator. Consensualism arises from the fact that the arbitrator was chosen equally by the respective parties to a contract. There is strong argument for the proposition that, because the parties have voluntarily submitted themselves to the arbitrators jurisdiction, they cannot bring a complaint on the grounds of his impartiality.

Members of councils, local bodies, catchment authorities and the like are elected to office by the people of the municipality over which that body exercises jurisdiction. In this way, an important difference arises between these bodies and the courts and statutory tribunals. A judge or tribunal member may have preconceived views on certain issues but these should not be made publicly known. A member who is elected to office, on the other hand, is often elected by virtue of a mandate, pursuant to which his views on a particular subject are an important public issue. It may be that, because of such a mandate, a member already has a bias upon assuming office.

This comment is true also of Members of Parliament and Ministers of the Crown. One of the platforms upon which the recent National Government were elected were its "think big" energy development projects. The application of the National Development Act to these projects (thereby bypassing otherwise necessary planning consents) was not the result of an operative bias arising out of predetermination of the issue, but of a commitment to the electors.

As we move further away from the judicial sphere, the impartiality of officeholders, while still important, is not regarded as an essential attribute; it is one of many other conflicting duties and responsibilities. A court must only concentrate upon it's duty to judge without fear or favour. A Minister of the Crown must weigh this duty against others and, as a consequence, will not be subject to the rigorous judicial standards to ensure that impartiality in the public eye, and in practice, is preserved.

3. The Types of Powers

The powers of the bodies just identified are many and varied. In some cases, they are narrowly confined, in others they are broad indeed in terms of matters that are to be weighed and taken into account. In some cases, they are of a particular, isolated character and, in others, of an ongoing, managerial type. In some cases, they are a power of final decision and, in others, recommendatory only.

These variations may be grouped more specifically:

A body may have the power to affect a particular person by making a decision regarding that person alone. Such a power is exerciseable by a court or tribunal. It may include imprisonment, the imposition of a fine, the refusal to grant a licence or to register an applicant as a salesman or disqualification from a trade or profession. Powers such as these affect important, personal rights and are therefore deserving of harsher standards to enforce impartiality in those who exercise them.

One step removed is a body having the power to make a final decision of consequence to a particular litigant without providing a remedy that affects personal rights. An example is provided by the Broadcasting Tribunal. The greatest remedy that can be awarded to a successful complainant regarding a breach of privacy or unjust treatment by a broadcaster [6] is a direction to the offending broadcaster that 'appropriate action' be taken. No penalty is imposed or relief afforded the complainant.

A body may have the power to affect a large number of people by making a general decision of practical significance to them all. Powers such as these are generally exerciseable by a local authority or a Minister of the Crown and include the decision to proceed with a construction, to stop a street or to alter a waterway. Although the decision is not directed to a particular person, individual rights, such as the right to undisturbed possession and quiet enjoyment of one's land, may be affected. Because of the general nature of the decision, many factors must be weighed and taken into account. These include the rights and views of others in the area, government or local government policy, employment in the region and the development of resources.

A body's powers may be limited to that of a recommendation, thereby having only the potential to affect individual rights. This is true of the Waitangi Tribunal and of the Planning Tribunal under the National Development Act andunder certain provisions of the Town and Country Planning Act and the Public Works Act.

Further distinctions can be drawn in considering how powers such as these are exercised and how they are to be found. The powers of a court of law are widespread and are found in a great number of statutes or in the inherent jurisdiction of the High Court. The powers of statutory tribunals can be easily found in one or more particular statutory provisions and, in the case of a non-statutory tribunal, in the provisions of the body's constitution.

The powers of a given Minister are not easily pinpointed and vary according to the portfolio for which he is responsible. Unlike the courts and tribunals, a Minister's powers are not necessarily exerciseable by him alone. He may exercise his powers individually by directing the activities of his department and collectively through the decisions of cabinet. In addition, powers can be exercised and decisions made on behalf of the Minister by high ranking department officials. Although the Minister is still answerable to Parliament for any such decision, it brings into play yet another category of decision maker - the public servant. Such a practice may be condoned by statute or, in the absence of statutory authority, recognised as acceptable under the Carltona line of cases. [7]

The application of a Minister's powers are not incident - specific as is true of a court. Powers are exercised through the preparation of legislation, the allocation of funds in the budget and through the application of general policy to particular cases.

Members of Parliament who are not Ministers exercise influence only. They do this by speeches and votes in Parliament and, in practice by their activities in the party room and party committees and by representations to Ministers and their advisors.

4. The Responses of the Law

The legal system responds in a number of ways to decision makers motivated by bias. These responses take the form of rules developed by the legislature, the courts and by more voluntary, less coercive methods.

The following responses are found in statute:

- A prison sentence of up to fourteen years may be imposed on a judicial officer or Minister, and of up to seven years on a Member of Parliament or public servant, who accepts a bribe in his official capacity. [8]

- An officeholder may be disqualified from office upon acquiring a conflicting interest. [9]

- An officeholder may be required to disclose a conflicting interest that arises and to stand down from office or abstain from voting for the purposes of that particular case. [10]

Other remedies are provided by the High Court in the exercise of its powers of review. An officeholder or body may be prohibited from sitting to view a matter if bias is demonstrated, an erring

body or officeholder may be directed to hear the matter again or, if that body or officeholder if found to be so biased that it would be unreasonable to expect them to rehear the matter impartially, certiorari may issue so as to quash any decision they have made.

A number of informal responses may operate in relation to Members of Parliament and public servants. A Minister may be liable to reprimand by the Prime Minister, demotion to a less important portfolio or to a direction to resign. A Member may be liable to expulsion from the chamber and a public servant may be liable to dismissal or a reduction in salary.

A further response is reflected in the establishment of committees of inquiry for the purpose of suggesting appropriate means to regulate conflicts of interest. From these reports, two over-riding 'solutions' can be drawn. The first is the avoidance of conflicts of interests by requiring an officeholder to declare his interest in a particular case to his colleagues. In this way, the weight to be attached to a particular statement or decision can be adjusted accordingly. The second is the avoidance of an interest by the compulsory registration, at regular intervals, of all personal interests of a kind that could belikely to conflict with an officeholder's official duties.

This paper begins by looking at the common law bias rules as they apply to judges and justices. The following section examines attempts that have been made to apply these rules to officeholders of a more varied nature. The very nature of these bodies and of

the powers they exercise preclude the operation of the common law rules in toto. A number of variations have ensued. Thirdly, the paper views attempts that have been made by the legislative to regulate conflicts of interest in particular bodies. Finally, the paper considers various other methods for regulating conflicts of interest as brought to light by the committees recently set up in Britain and Australia for that purpose.

B. COMMON LAW PRINCIPLES APPLIED TO THE JUDICIARY

The common law of bias developed initially to control judicial offices. It is necessary to consider that law first before turning to the application of it to officials of a different kind.

These common law principles are rather clear cut, applying as they do to officeholders whose impartiality is regarded as essential. Their aim is to prevent all but the remotest suspicion of bias, their application is even and has changed little over the years. The section begins with a summary of early English case law from which present principles derive their existence. It moves to state the basic principles of what may be called the modern notion of the nemo judex maxim and, specifically outlines the various tests that are applied to determine whether bias can be seen to exist. The various causes of bias will be noted, as will some exceptions to the rules. In discussing these principles, it will be necessary to make references to cases and situations that go beyond the rules applicable to the judiciary. These deviations are often necessary to clarify the basic rules and reflect the fact that rules applying to particular officeholders cannot be viewed in isolation but form an integral part of the whole law as it relates to bias. With these principles as a basis for the paper, it will be seen how they have been varied by the courts and by Parliament when attempting to apply them tobodies whose impartiality is not regarded as being their most essential attribute.

1. Early English Case Law and Opinion

Early common law principles regarding disqualification for interest were clear and simple. A judge was disqualified for direct pecuniary interest and nothing else. Although Bracton tried, unsuccessfully, to incorporate into English law the view that mere "suspicion" by a party was a basis for disqualification, [11] it was Coke who, with reference to cases in which the judge's pocketbook was involved, set the standards for the time in his injunction that "no man shall be a judge in his own cause." [12] Blackstone rejected absolutely the possibility that a judge might be disqualified for bias as distinguished from interest:

> "The law will not suppose the possibility of bias or favour in a judge." [13]

Pecuniary interest took many forms. A judge might be disqualified as in Dr Bonham's case [14] because he received the fine which he had the power to inflict; and the Mayor of Hertford [15] was "layed by the heels" for sitting as a judge in an ejectment case in which he was the lessor of the plaintiff. A similar charge of interest arose whenthe judge's status as a citizen and taxpayer of a unit of society might be affected by his decision. Thus, for example, in a case involving a pauper, a judge was disqualified for interest because the decision affected his taxes. [16] These cases went too far, for, if judges were disqualified as taxpayers, some suits could scarcely be decided. Mindful of this difficulty, Parliament, in 1743, provided that taxpaying justices of the peace might sit in such local government cases. [17] From this grew the modern doctrine of 'necessity"; that judges should not decline to sit when no substitute was

readily available. As Pollock expressed it:

> "The settled rule of law is that, although a judge had better not, if it can be avoided, take part in the decision of a case in which he had any personal interest, yet he not only may, but must do so if the case cannot be heard otherwise." [18]

A variant of 'interest' is 'relationship', the problem when a judge participates in a case involving his relative. Oddly enough, the English courts, held, in Brooks v Rivers [19] that a judge was not disqualified by a relationship, but that a jury was. In the latter connection, courts were faced with deciding what degree of relationship necessitated disqualification, a problem which, it it's modern context, remains as perplexing today as it was then. As was noted in 1572 [20] "all the inhabitants of the earth are descended from Adam and Eve and so are cousins of one another" but "the further removed the blood is, the more cool it is". The line was drawn, in that case, at the ninth degree.

In short, the common law was simple in the extreme. Judges were disqualified for a financial interest in the subject matter of the proceedings. Bias arising out of other matters such as personal relationships and prior indications of attitude were not seen as reasonable causes to overturn a decision. The test was proof of bias; that a significant financial interest did, in fact, exist.

2. Current Notions of the Rules Against Bias

One of the earliest leading cases affirming the nemo judex in causa sua doctrine as we know it today was Dimes v Grand Junction Canal [21] There, Lord Chancellor Cottenham had affirmed a number of decrees made by the Vice-Chancellor in favour of a canal company in which Lord Cottenham was a shareholder, to the extent of several thousand pounds. Lord Campbell said:

> "No one could suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest he had in this concern; but, my Lords, it is of the last importance that the maxim that no man is to be a judge in his own cause should be held sacred. ... This will be a lesson to all inferior tribunals to take care not only that in their decrees they are not influenced by their personal interest but to avoid the appearance of labouring under such an inference." [22]

This doctrine was applied equally to cases where no pecuniary interest was involved. In R v Sussex Justices, ex parte McCarthy [23] the acting clerk to the justices wa also a member of the firm of solicitors who were acting for one of the parties in a dispute. The clerk retired with the justices in case they should desire to be advised on any point of law. Although the conclusion was reached without consulting the derk , Lord Hewart CJ said:

> "the question is whether he was so related to the case in it's civil aspect as to be unfit to act as a clerk to the justices in the criminal matter. The answer to that question dependes not on what actually was done but what might appear to be done. Nothing is to be done that

creates even a suspicion that there has been an improper interfernce with the course of justice."

It is then a matter of appearances. The need to maintain public confidence in the judiciary outweighs considerations of actual bias. The question becomes, what is the correct test to determine whether there is an appearance of bias? The courts have adopted two:

3. Real Likelihood or Reasonable Suspicion of Bias?

The 'real likelihood of bias' test was formulated by Blackburn J in R v Rand [24]:

"Wherever there is a real likelihood that the judge would, from kindred or favour, or any other cause, have a bias in favour of one of the parties, it would be very wrong for him to act."

This test was expressley adopted by Vaughan Williams LJ in R v Sunderland Justices [25] and was applied in New Zealand in Healey v Rauhina [26]. A problem remained however - whether the real likelihood test was to be objective, based on the evaluation of the reviewing court, or whether it was to be a 'reasonable man' test. R v Barnsley Licencing Justices [27] seemed to have settled the question in saying that the real likelihood of bias had to be

"determined from the probabilities to be inferred from the circumstances, not upon the impressions that might reasonably be inferred from the circumstances, not upon the basis of the impressions that might reasonably be left on

the mind of the party aggrieved or the public at large." [28]

However, doubts are cast upon this formualtion due to cases such as Ex parte Lewin, Re Ward [29], an Australian case, where McClements J formulated the test thus:

"Would the reasonable man, knowing the facts, draw the inference that the magistrate would be likely to be biased one way or the other?"

Amid this uncertainty, the English Court of Appeal in Lannon [30] seems to have further complicated the matter by introducing the lesser test of 'a reasonable suspicion of bias'. There, the chairman of a rent assessment committee lived with his father who was tenant in a group of flats controlled by the same company whose rent increases were under review. Denning MR seems to have interwoven the two tests. The following quote from his judgement is worth setting out in full. (The emphasis is mine)

"There must be circumstances from which a reasonable man would think it likely or probable that the chairman would or did favour one side unfairly at the expense of the other. The court will not inquire into whether he did in fact favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence and confidence is destroyed when right-minded people go away thinking 'the judge was biased'." [31]

At one point, Denning MR talks of probability at the instance of the reasonable man and at another, he refers to what the reasonable man might think - a little less than probability.

Edmund Davies LJ clearly favoured the 'reasonable suspicion of bias' test. Danckwerts LJ seemed to favour the reasonable suspicion approach but said that he found it extremely difficult to make up his mind, contenting himself to conclude that it was "not wise" for the chairman to have acted.

In R v Commonwealth Conciliation and Arbitration Commission, ex parte The Angliss Group [32] it was held that public confidence in the courts of law may be undermined by a suspicion of bias reasonably, and not fancifully entertained by reasonable minds. The joint judgement held that the expression of altitude by the Commission favouring an equal pay policy and even a step taken in furtherance of that policy were not sufficient to engender a reasonable suspicion in the minds of those who came before the tribunal and the general public that the tribunal and it's members would not bring fair and unprejudiced minds to it's adjudication. [33]

To reconile the two different tests, Whitmore and Aronson [34] suggest that the real likelihood approach should be used to avoid invalidation of decisions where there is a minor technical breach and to avoid an over-strict application of the rule to administrative bodies. Such an approach was followed in R v Camborne Justices, ex parte Pearce [35] where the court remarked that the reasonable suspicion test was being urged as a warrant for invalidating orders on quite unsubstantiated grounds and upon the "flimsiest pretexts of bias". Whitmore and Aronson go on to suggest that the 'reasonable suspicion of bias' test is appropriate to cases where it is necessary to avoid embarrasment or where impartiality of decision making is essential and there is a

danger of loss of public confidence if apparently biased decisions are allowed to stand.

There has been speculation as to how much difference there really is between the two tests. Sachs Lj in Hannan v Bradford Corporation [36] said:

> "I doubt whether, in practice, materially different results are produced by the real liklihood of bias test or that adopted by the county court judge ("whether a reasonable man would say that a real danger of bias exsisted") if there is a difference, I uphold the latter and respectfully adhere to the school of thought adopted in Lannon's case."

If confusion existed in Sach LJ's mind, he has compounded that confusion for others by equating the trial judge's "real danger of bias" with Lannon's "reasonable suspicion of bias". Wade [37] follows the view that, in most cases. either test will lead to the same result:

> "This might be so in all cases if likelihood is given the meaning of possibility, rather than probability. For, if there is no real possibility of bias, no reasonable person would suspect it."

But, it is submitted, there is a material difference between these two tests. It is a far harder task to prove that it was really likely that an officeholder was biased than it is to show a suspicion that he may have been biased. One of the more recent statements on this matter by a New Zealand court was that of Mahon J in Anderton v Auckland City Council [38]. It was not necessary for Mahon J to review the tests relating to appearances

of bias for, in the end, the case turned upon the pure exercise of a discretion by a Minister. Nevertheless, the learned judge's exersise in this respect will prove to be of great assistance to subsequent courts when faced, in different circumstances, with an allegation of bias.

After reviewing a raft of case law throughout the Commonwealth, Mahon J concluded that the tests were clearly distinct and may be used in different dircumstances. i.e: (1) A party may prove actual bias. (2) Presumptive bias through pecuniary interest will operate as a disqualifying factor upon mere proof of that interest. (3) Presumptive bias based upon a 'real likelihood of bias' can be used when there is evidence of pecuniary or other interests. A reviewing court will assess for itself whether the impartial observer, apprised of all the relevant facts would consider that the real likelihood existed. (4) Presumptive bias based upon a 'reasonable suspicion of bias' may be proved by relying soley upon the manner in which the proceedings were conducted. The court will judge the impression, to be considered objectively on the mind of a litigant or observer unaccouainted with any outside facts or circumstances created by the outward form or conduct of the proceedings under review.

If this line of reasoning is followed, an applicant for a writ of certiorari or mandamus has two options: if he has some evidence of favour or interest, he must set out to prove a real likelihood of bias. This would be the case where there is a pecuniary interest in the matter for adjudication on the part of the judge or if the judge or officeholder is known to be partisan in favour of or against a particular litigant.

If there is no such evidence however, the applicant need only show that the appearance of the proceedings might give rise to a suspicion of bias. This would be the case where an office-holder instigates proceedings and then goes ahead to adjudicate on them or where a clerk who has an interest in the proceedings retires with the judges to assist in the making of a decision.

In this way, the felt need to avoid even the remotest suspicion of bias in order to retain public confidence in the judiciary requires no evidence as to the actuality of bias.[39]

As well as the two tests for bias introduced thus far, it is necessary at this stage to introduce a further test applicable to a different category or officeholders. As hinted at earlier, this was the test upon which the Anderton case actually turned: if an officeholder is given, by statute, a discretion as to the exercise of a power, he must actually exercise that discretion. If the officeholder's mind is so foreclosed, because of an operative bias, that he will not even consider alternative arguments, he has failed to do what Parliament has asked of him; to exercise his discretion at all.

However, what is the position where bias is disproved, or, alternatively, the person allegedly aggrieved by a decision acknowledges that there was no actual bias on the part of the person or body whose decision is being challenged? In Sussex Justices bias was disproved yet the applicant still obtained his remedy. In Lannon, an acknowledgment by the applicant for certiorari of no actual bias did not prevent the issue of the writ. Conversely, in Barnsley, Devlin J acknowledged that, on

the facts, a reasonable person would have suspected bias but in his own mind there was no real bias; on this basis, relief was refused.

D J Mullan [40] postulates that, even allowing the thoughts of the reasonable man to be the governing test, it is till pertinant to ask if justice is really seen to be done if an applicant for certiorari is allowed his remedy after disclaiming actual bias. It does seem a little indongrulous for such a litigant to argue that, on the facts a reasonable man would have suspected bias and at the same time to say that he, the applicant, knows that there was in fact no bias. If the applicant has such knowledge then, for him at least, justice has been seen to be done.

4. The Cause of Bias

(a) Pecuniary Interest

R v Rand [41] decided conslusively that a personal pecuniary interest on the part of the adjudicator raises a conclusive presumption of bias irrespective of the other tests. Thus, where licencing justices, who were directors of a brewery company that was apploying for a licence, resigned their directorships and sold their shares immediately before sitting as members of the licencing authority, it was held that their recent pecuniary interest, viewed in conjunction with the fact that they had supported the application as justices, disqualified them from sitting. [42]

However, it is to be noted that a remote pecuniary interest will not disqualify. In R v McKenzie [43], it was held that magistrates should not be disqualified because three of their number owned shares in shipping companies which were insured in an association

which was a member of the Shipping Federation of which the informant was an official.

(b) Family and Personal Relationships

The disqualifying effect of family ties is so well known that is cause little difficulty and produces little case law [44]. The same may be said of personal friendship cases but, in Cottle v Cottle [45] Sir Boyd Merriman P warned of the difficulties that may arise if this assumption is taken too far:

> "It would be a prepostorous thing if a suggestion were to be made that, because of the mere fact of some sort of accuaintance between a justice and the parties, a bias or a possibility of bias existed. If such an exacting test were put upon the right of justices to sit, it may very well be that the whole structure of summary jurisdiction would be upset."

(c) Personal Hostility

Strong personal animosity towards a party will disqualify a judge from adjudicating. A conviction, by an Irish Magistrate, was quashed when it was shown that very bad feeling existed between him and the defendant's family and that, shortly after the hearing, he had used words indicative of enmity towards the defendant. [46] Such demonstrated bias may arise equally out of a hearing. In Ex parte Schofield, Re Austin [47], a magistrate heard obstruction charges against two men, brought by a police constable. During the course of the hearing, he described the

two men as perjures and convicted them. He then went on to hear cross-summonses for assault brought by the two men against the constable. Certiorari, naturally, issued.

A further example can be taken from outside the purely judicial sphere. In White v Kuzych [48], the respondent was found guilty by the investigating committee of his union of publically opposing the union's policies. Their Lordships found that there was, before and after the trial, strong and widespread resentment felt against the respondent by many in the union. They concluded that if the so-called "trial" and the general meeting which followed had to be conducted by persons previously free from all bias and prejudice, this condition was certainly not fulfilled.

(d) Attitudes Towards the Issue

General expressions of hostility or attitudes held towards an issue do not disqualify. The view of Palles C B in R v The Recorder and Justices of the County of Dublin [49] is generally regarded as being accurate:

> "The interest or bias which disqualifies must be real and substantial and such as was likely to influence the mind, not a mere interest in humanity, or an interest in the protection of animals from cruelty. Such an interest would no more disqualify a magistrate than an interest in the supression of a vice. ... The interest or bias that disqualifies must be something reasonably likely to bias or influence their minds in the particular case."

As a result, the refusal of an application for a publican's licence by the Quarter Sessions was not held to be invalid by reason of three judges comprising the Quarter Sessions being subscribers to an association for the prevention of intemperance. However, in an earlier New Zealand case of similar facts, such inclinations were found to constitute bias: In Isitt v Quill [50] the majority of the licencing committee for the Sydenham District were comprised of prohibitionists. Over a period of two years, they refused renewals of all liquor licences in their district. It was found that the committee expressed their determination not to grant any licences, not on the ground that there were circumstances within their knowledge and peculiar to the district which rendered it unncessary to grant such licences in the district, but on the ground that licenced houses were improper and could not, under any circumstances, be required. In acting on a foregone conclusion, they failed to consider each case on it's merits according to the statutory criteria. Such a condusion brings Isitt v Quill within the bias that Palles C B said would disqualify; a bias likely to influence their minds in the particular case. Moreover, the nature of their preconceptions would influence them in every case that came before them.

This case turned on the same point as did the Anderton case. It turned, not on a breach of natural justice, but on the fact that, in acting pursuant to a foregone conclusion, the committee members had effectively closed their minds to any alternative arguments. In doing so, they had failed to do what Parliament had asked of them: To exercise the discretion required by statute.

This state of affairs brings to light a perhaps irreconcileable conflict in the nature of elected offices such as a licencing committee. On the one hand, they are entitled to be elected pursuant to a mandate, which may, as in the case of Isitt v Quill, take the form of a very strong bias. If elected members are entitled to assume that such a policy is favoured by the electorate and in carrying out their official duties, they can act pursuant to it. On the other hand, they are often required to adhere to particular statutory criteria in making a decision. It is often the case that these criteria leave no room for the operation of particularly strong policies. The consequence may then be that there is little room for the full operation of such policies.

(e) An Interest in the Outcome of the Proceedings

In R v London City Council, ex parte Akkersdyk [51], a committee of councillors briefed a solicitor to oppose an application for a music and dancing licence on their behalf and then proceeded to sit with the Council when it considered the application. Mandamus issued. Similarly, in Ex parte QANTAS Airways Ltd, Re Horsington [52], it was held that a justice of the peace is disqualified from receiving a complaint and issuing a summons against the company when he is an officer of the union which laid the complaint and which may recover the penalty imposed.

(f) Adjudicators as Prosecutors

This is perhaps one of the most glaring cases of being a judge in one's own cause. The obvious nature of the interest involved

requires the citation of only one example. In response to allegations that a medical practitioner had acted indecently towards women, an optional board of registration sent women to the doctor's surgery in order to test the validity of the claims. As a result of their findings, the practitioner was called before the board for a hearing. Prohibition issued to prevent a continuation of the charges. [53]

(g) Appellate Bias

It is of some interest that, at common law, there is nothing to prevent a trial judge from sitting with an appellate court to hear an appeal against his own decision. This is not the case, however, outside the judiciary. Hannan v Bradford Corporation [54] saw a board of governors terminate a teacher's employment. A sub-committee of the Corporation met, in the exercise of it's statutory power, to hold an inquiry into whether it should prohibit the dismissal. The chairman and two members of the sub-committee were also members of the school's governing body. It was held that the governors did not, upon donning their sub-committee hats, cease to be an intergral part on the body whose action was being impugned and it made no difference that they did not personally attend the governor's meetings.

It is in these areas that the rules against bias which were developed for the courts become strained, often to the point of absurdity, if they are to apply to bodies having a continuing involvement with the matters in issue, which have been elected on a policy or have some general role in relation to the area of administration. The example has already been taken of a licencing

committee. Others include a local authority that may be committed to a town plan or a member of a trade union elected to office because of a line taken on certain issues. It is officeholders such as these with which this paper is primarily concerned.

5. Exceptions to the Rules Against Bias

The 'doctrine of necessity' operates when the rules governing a tribunal contemplate that an adjudicator may have conflicting interests and where the officeholder's task, if not performed, would prevent a party obtaining redress. The instances in which the doctrine operates were stated in O'Kane v Alcyon Shipping Co [55] thus: (1) Where the tribunal objected to as interested is the only tribunal that can deal with the subject matter; (2) Where the legislature has directed the interested tribunal to decide.

A statutory example is s58 of The Town and Country Planning Act 1977 which provides that a council may negotiate for the purchase of land and reach agreement with a developer on a mutually acceptable planning scheme and this fact alone in not a ground for challenge to a council's decision to go ahead with the proposal. Hence, the maxim that no man shall act as a judge in his own cause must yeild to the legislature's intention that he shall.

A recent New Zealand example of this doctrine in action is the decision of the Privy Council in Jeffs v New Zealand Dairy Board [56] The New Zealand Dairy Board was obliged to determine zones of operation in respect of certain dairy factories. The Board had,

under it's statutory powers, advanced money to one of the dairy factory propietors and was clearly in a position of having a financial interest and thus disqualified from resolving the zoning issue. In their Lordship's view, the conclusion was inescapable: Parliament intended in conferring the power to determine zoning issues to make an exception to the general rule. The challenge to jurisdiction was therefore rejected.

A statute may, however, only provide limited protection. The statutory shield may be narrower than it first appears. If bias is actually proven, the decision may be quashed. The statute must thus be carefully constructed and it's limits carefully measured. A privative clause might for instance, despite appearances, be interpreted as affecting form and not substance and as not protecting proceedings from the defect of actual bias.

6. The Effects of Bias or Interest

When an administrative act or decision is subject to judicial review, the court can intervene on two grounds: Ultra vires and error on the face of the record. Since bias will not appear on the face of the record, the court necessarily intervenes on the former ground. In discussing the ultra vires nature of a decision, most commentators are of the view that the presence of bias means that the tribunal is improperly constituted so that it has no power to determine the case and, accordingly, that its decision must be void and a nullity. [57] de Smith [58] notes that most of the cases relevant to this proposition are concerned with the effects of non-compliance with the audi alteram partem rule but suggests that it would be incongruous

to adopt a different analysis for the rule against interest and bias. He does make reference to the fact, however, that there is some authority to the view that adjudication by one who is disqualified at common law for interest and bias makes the proceedings voidable; not void, so until the decision is quashed, it cannot be impeached collaterally - by mandamus.

The issue seems to have been settled in New Zealand by the 1984 Court of Appeal case of Love and Robson v Porirua City Council [59] There it was held that if ivalidity of the Council's decision was found the decision has at least a de facto operation unless or until it is declared to be void or a nullity by a competent body or court. In that sense and during that period, it continues to have some effect or existance in law.

> "Whatever language might be used to describe the quality of the decision pending the declaration in appropriate proceedings that it is to be set aside as invalid, it cannot be considered as totally void in the sense of being legally non-existent."

Mindful of this decision as declaring the current state of New Zealand law, the traditional practice in licencing cases of sending the case back to the licencing authority by mandamus, unaccompanied by certiorari is to be noted. An unescapable problem with this approach arose in Isitt v Quill. Had there been any reasonable prospects of the licencing committee performing the duty entrusted to them by the law, the proper course of action would have been a mandamus, ordering them to hear and determine the case again. The evidence, however, disclosed so biased a state of mind on their part that it was unreasonable

to expect them to be able to exercise the discretion given to them by law. It was said that, in such circumstances, the respondent was entitled to certiorari to quash the order. It was not within the powers of the court to decide that the respondent was entitled to a renewal of his licence.

The remedies of certiorari, mandamus and prohibition are discretionary on the reviewing court. After viewing the merits of a case, the court may, in the proper exercise of it's discretion, refuse to issue the writ.

This discretion is exerciseable even where there is a statutory 'privative clause' seeking to exclude judicial review. [60] However, Anisminic v Foreign Compensation Commission [61] shows that, when words in a statute oust the power of the High Court to review decisions of an inferior tribunal, they must be construed strictly and they will not have the effect of ousting that power if the inferior tribunal has acted without jurisdiction or if it "has done something or failed to do something which is of such a nature that it's decision is a nullity" But, if the inferior tribunal has merely made an error of law, which does not affect it's jurisdiction and if it's decision is not a nullity for some reason such as a breach of the rules of natural justice, the ouster will be effective. Allegations of bias go to the court or tribunal's jurisdiction to hear the matter at all. Such privative clauses then may be ignored.

The matter of the effect of judicial decisions inspired by bias becomes far more compound when it is found that a judge has been corrupt for a length of time, so that his errors are woven into

the fabric of the law. The complexity of this problem is illistrated by an incident that arose in the United States in the 1930s.

A judge was found guilty of accepting bribes from litigants to decide cases in their favour. The question was, what was to be done about the cases in which he had taken bribes? It was decided that they should all be reheard by a reconstituted court. The cases all invloved patents and, in a number of them, the convicted judge had declared the patents to be invalid. A period of years ensued before any doubt of these decisions arose. During this time, it was assumed that certain of the patents had legal force, in fact, one of the decisions had become a leading case in patent law and was relied upon by other courts in deciding the validity of still other patents. When the cases were reheard, a number of them were reversed so that the patents in question were finally held to be valid. The further question then arose as to what should be done with the lost years during which the patent-holder was deprived of profits and royalties he should have enjoyed? The solution was to pass a special Act of Congress extending the life of the patent by a period equal to that during which it was assumed to be invalid. Fuller [62] describes this as "rough justice"

> " ... 'rough' because seven years in the 1940s cannot be the same as seven years in the 1930s, especially when account is taken of the effects of technological progress that would tend to reduce the value of the patents."

Bias and interest, then, not only result in adverse effects to a litigant but can produce serious consequences for the efficient operation of the law.

With these principles in mind, the remainder of this paper does three things:

(1) It considers their application to a variety of other decision makers. In doing this, it recognises that some cases do not turn on the issue of natural justice at all but, instead, on the failure to exercise a discretion due to an operative bias.

(2) It considers certain of Parliament's responses to interest and bias. This takes two forms. First, legislative attempts to promote impartiality in bodies which, because of their very nature, are inherently biased and second, provisions which dictate the consequences of a personal bias stemming from an officeholders personal, not public, activities and associations.

(3) It presents some further means for regulating conflicts of interest. Many of these are of a self-regulatory nature and do not share the compulsion inherent in statutory regulation.

C. THE APPLICATION OF THE RULES AGAINST BIAS TO 'ADMINISTRATIVE' DECISION MAKERS

1. Classification According to the Nature of the Function

It has been the tendancy in the past for the courts to classify officeholders according to the nature of their function and, on this basis alone, to decide whether or not the rules against bias are applicable. When the function was classified as 'administrative', courts tended to the view that bias was an irrelevant concept. This principle is often said to have stemmed from Frome v Bath Justices [63] where Viscount Cave said:

> "If there is one principle which forms an intergral part of the English law, it is that every member of a body engaged in a judicial proceeding must be able to act judicially; and that it has been held over and over again that if a member of such a body is subject to a bias in favour or against either party to the dispute or is in such a position that bias must be assumed, he ought not to take part in a decision or even sit upon the tribunal. This rule has been asserted, not only in the case of courts of justice or other judicial tribunals, but in the case of authorities which, although in no sense can be called courts, have to act as judges of the rights of others."

This citation cannot, however, be used as authority for the proposition that only if the functions of a decision-maker are considered judicial can the common law principles apply. It's emphasis comes in it's last line - such principles must be adhered to by officeholders having the power to act as judges of the rights of others.

A similarly misunderstood passage was the following quote from R v Electricity Commissioners, ex parte London Electricity

Joint Committee (1920) Ltd [64], where Atkin L J said:

> "Wherever any body of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially, act in excess of their legal authority, they are subject to the controlling juridiction of the Kings Bench Division exercised in these writs" (my emphasis

It was not until Ridge v Baldwin [65] that true meaning was given to the phrase "having the duty to act judicially": The phrase was there as a consequence of the existance of a "legal authority to determine the questions affecting the rights of subjects. If a legal authority of that nature exists, then there is a duty to act judicially."

Subsequently, in Durayappah v Fernando [66] the Privy Council continued the movement away from the classification approach by stressing that, in determining whether the rules of natural justice apply, a court must look at the entire context, both statutory and factual. It must consider three things: (1) What is the nature of the property, the office held, status enjoyed or services to be performed by the complainant or injustice? (2) In what circumstances or upon what occasions is the person claiming to be entitled to exercise the measure of control entitled to intervene? (3) When a right to intervene is proved, what sanction is available to be imposed?

The circumstances in which a duty to act according to the principles of natural justice were extended even further in Daganayasi v Minister of Immigration [67] Now, a duty to act according to the principles of natural justice will be implied whenever a legitimate expectation

is created in the affected party that they have rights under the law and that they will be heard.

Similar observations have been made in Pearlberg v Varty [68] and in R v Liverpool Corporation, ex parte Liverpool Taxi Fleet Operators Association [69] In the former case, Lord Pearson said:

> "Where some person or body is entrusted by Parliament with administrative or executive functions, there is no presumption that compliance with the rules of natural justice is required, although, as Parliament is not to be presumed to act unfairly, the courts may be able in suitable cases (perhaps always) to imply an obligatim to act with fairness." [70]

In the latter case, Roskill L J said:

> "The power of the court to interve e is not limited ; as once was thought, to those cases where the function is judicial or quasi-judicial. The modern cases show that this court will intervene more widely that in the past. Even where the function is said to be administrative, the court will not hesitate to intervene, in a suitable case, if it is necessary to ensure fairness." [71]

This is the approach adopted by New Zealand. In Lower Hutt City Council v Bank [72] McCarthy P observed that the clear-cut distinctions between administrative functions and judicial functions is not to be accepted as an answer to a case where bias is alleged. Instead, whether the rules against bias apply

"is to be decided upon a realistic examination of the legislation, the circumstances of the case and the subject matter under consideration." [73]

It is to be noted that some commentators, in attempting in a similar manner to avoid the labelling of a body's functions create classifications of their own. Robert Reid and Hillel David [74] submit that the power to affect rights is quasi-judicial and a lack of it is administrative. Wade [75] suggests that the term 'quasi-judicial' was introduced so that the principles of natural justice might be applied to them as far as practicable. Such reasoning brings the whole matter back to square one. ie A power to affect rights is quasi-judicial so the bias rules apply, while no such power makes the function adiminstrative and the bias rules are inapplicable. Attaching labels in this way bears the risk that a tribunal will make a decision, when viewing the possibility of bias, without a true evaluation of the legislation, the circumstances of the case and the subject matter under consideration.

Bearing this in mind, the purpose of this section is to evaluate, in relation to the various officeholders identified in Part A of this paper, to what extent the principles discussed in Part B are applicable. In relation to each of the four categories of office-holders here to be discussed, the nature of the office and its essential defferences from a court of law will be noted and recent cases will be discussed to determine just what test is applicable in determining whether or not a bias is present.

2. The Actor is a Statutory Board or Tribunal

'Tribunal' is a word embracing many kinds and sorts. A standard appropriate to one may be inappropriate to another. Facts which may constitute bias in one may not amount to bias in another. The question must be, what is the standard to apply to this tribunal? Not, what is the standard that applies to tribunals? A standard appropriate to a body concerned with commercial arbitration may be inappropriate to a public inquiry that neither hears contests between parties nor decides anything but merely makes a report that others may or may not act upon. Some examples of the differences in nature and remedies may be taken.

The Small Claims Tribunal is very much akin to a court of law. It's primary function is to bring the parties to a dispute to an agreed settlement. [76] The tribunal may make an order awarding damages, requiring specific performance or declaring a contract to be void. [77] An order of the Tribunal is final and binding on all parties to the proceedings. [78] Taking a cautious step outside the judicial arena is the Broadcasting Tribunal. The primary functions of this Tribunal are to hear warrant applications and to determine complaints alleging breaches of programme standards brought by members of the public against a warrant holder. [79] A potential conflict is provided by s68 of the Broadcasting Act 1976. On the one hand, it recognises the duty of the Tribunal to act judicially and, on the other, it requires the Tribunal to have regard to government policy, comminucated to the Tribunal by directives of the Minister of Broadcasting. [80] The tribunal's greatest power is to impose a monetary penalty of

$500 if it is of the opinion that a broadcaster has breached the conditions of it's warrant. [81] Apart from these rare cases, the remedies of the Tribunal are limited to recommending "appropriate action" to the broadcasting body by which theprogramme was broadcast or to giving a direction to the broadcasting body requiring it to broadcast a statement that refers to the complaint. [82] No form of personal redress (by way of costs or damages) are provided a successful complainant. Even lesser remedies are available to the Waitangi Tribunal. This Tribunal is to consider claims from Maoris that they are or are likely to be prejudicially affected by an Act, regulation, Order in Council or any policy or act of the Crown. [83] The Tribunal's only remedy in the case of a well-founded claim is to recommend to the Crown that action be taken to compensate for or remove the prejudice. [84]

All of these bodies, and the many others whose nature, functions and remedies differ to even greater extents may be subjected to allegations of bias. This lack of uniformity makes the problem immensley more difficult and subtle than the problem of bias in the courts themselves.

A further problem with statutory tribunals is that, in many cases, statutory provisions as to their membership can form an appearance of 'built-in' bias. Primarily, this speaks to provisions as to a member's qualifications and as to the method of appointment.

Statutory provisions regarding qualifications can require members to represent certain areas of society or certain industries. eg The Education Authorities Appeal Authority - eight members are to represent employer organisations and three members are to

represent employee organisations. [85] The Representation Commission - one member is to represent the government and one member is to represent the Opposition. [86]

Some statutory provisions require members to be chosen from associations established to deal with the particular area of jurisdiction. eg Motor Vehicle Salesmen Registration Authority - three members are to be members of the Motor Vehicle Dealers Institute [87] Public Service Appeal Board - service officers are to be members, past or present, of the Public Service Association. [88]

Other statutory provisions require the presence of ex-offico members. eg The Legal Aid Board (as well as the chairman and two other members) is to include the Secretary to the Treasury, the Secretary for Justice and the Chairman of the Social Security Commission. [89] The Representation Commission is to include the Surveyor-General, the Government Statistician, the chief Electoral Officer, the Director-General of the Post Office and the Chairman of the Local Government Commission. [90]

As to the method of appointment, a statute often requires, or practice ensures, that nominations for membership are sought from organisations with an involvement in the area in question. The statute may require that a member is to be appointed by the Governor-General on the recommendation of the appropriate Minister after consultation with a person or body outside the department having responsibility for appointment. Examples of tribunals following this peocedure are: The District Law Practitioner's Disciplinary Tribunal - consultation with the appropriate District Law Society [91] and the Planning Tribunal -

one member is to be appointed after consultation with the New Zealand Counties Association and one member is to be appointed after consultation with the Municipal Corporation of New Zealand. [92] Alternatively, the statute may require that the member be appointed by the Minister after consultation with an outside person or body. Examples of bodies following this procedure are the Cooperative Dairy Companies Tribunal - members appointed after consultation with the New Zealand Dairy Board [93] and the Hotel Association of New Zealand Disciplinary Committee - consultation with the Chief Executive of the Hotel Association of New Zealand. [94]

Due to these factors and also to the the fact that the function of a number of statutory tribunals is to provide the Government with access to expert advice within a particular area or subject matter, the appearance presented is that many members of statutory tribunals are not divorced from but are affiliated to matters that are likely to come within their jurisdiction.

Such a statement cannot, however, be viewed in isolation and should be clarified a little. It is often the case that statutory tribunals are not involved with decisions affecting peoples rights and, to this extent, an outward appearance of impartiality is not essential. eg The primary purpose of the Broadcasting Tribunal in the area of complaint resolutions is to keep broadcasters in check and not to provide a remedy to a successful complainant. Complaints are primarily concerned with breaches of the programme standards set out in section 24 of the Broadcasting Act 1976 and of the rules drawn up by the Broadcasting Rules Committee. Under section 67 (1) (b) of the

1976 Act, the Tribuanl may hear appeals from the decision of the Broadcasting Complaints Committee if unjust treatment or an invasion of privacy is alleged but, even in these cases, no remedy is provided for a successful comp;ainant short of directing the offending broadcaster to remedy the situation. The focus then is not on the rights of complainants. It may be postulated that it is for this reason that the Tribuanl is to have regard to government policy under section 68 of the 1976 Act; thereby detracting from the appearance of impartiality; at least in the public eye.

Thsi is not true of all cases. The Motor Vehicle Salesmen Registration Authority and the Public Service Appeal Board have the power to deprive someone of their livelihood. The need to preserve an air of impartiality seems to be outweighted by the need to secure the presense of specialist members. The following cases deal with such situations applying often different tests to establish whether a requisite degree of bias is present so as to disqualify a member from acting.

In Allinson v General Council of Medical Education and Registration 95 the Council had judged the plaintiff guilty of 'infamous conduct in a professional respect' and erased his name from the register. The inquiry was instituted at the instance of a society who aimed to promote honourable conduct in medical practitioners. One of the members of that Committee was also a member of the Council. The court saw it to be impossible that any reasonable person would think that he was biæed or that in substance or in fact he could be liable to be even suspected of bias. Again, the Council had the power to affect an individual's rights by depriving him of his livelihood and so the judicial principles as to bias apply in toto.

A decision with similar facts to Allinson reached the same result but by way of somewhat strained and unusual reasoning. In Re Rosenfield and College of Physicians and Surgeons [96], it was contended that members of a disciplinary committee of the college were hearing appeals against their own decision. A first meeting of the committee had found the plaintiff guilty of misbehaviour and put him on probation. A rehearing resulted in the plaintiff being put on a special register but not dismissed from the charges against him. Some of the members of the first committee were also members of the second committee. It was said that:

> "While it seems highly undesirable that the Council meeting should be comprised of members with varying amounts of prior knowledge, I am not prepared to hold that the presence of members of the disciplinary committee constituted a denial of natural justice. Nothing in the Act regulates or prohibits this."

This case can be termed "unusual" because, normally, it is not because the legislation does not prohibit bias that conflicting interests are held to be permissable but because the legislation specifically allows such interests to be present. The only stated exception to the operation of the rules against bias (whatever the test used may be) when an officeholder has power to affect individual's rights is the doctrine of necessity and a prerequisite to the application of the doctrine in an authorisation by Parliament that the officeholder may have a conflicting interest.

The committee in Rosenfield had the power to, and did adversely affect the rights of the appellant but this was not thought to be enough to warrant the operation of judicial principles.

A difference in the nature of a statutory tribunal's function giving rise to different and lesser standards of impartiality being required in illustrated by the New Zealand Case of Turner v Allinson [97] The Turners had bought property in an area zoned residential. They applied, under s35 of the Town and Country Planning Act 1953 for a specified departure to enable them to be able to establish a shopping complex there. Appeals against the rezoning were heard by the Town and Country Planning Appeal Boars. The Chairman of the Board had already suggested this rezoning, knowing that it applied to the Turner's land. The decision to grant the rezoning was objected to on the ground that the members of the Board had already expressed views in favour of the application. Turner J said:

> "In a sense, it is predetermination, but it is a kind of predetermination peculiarly characteristic of decisions of this kind. The mention, and the recognition of it by the tribunal itself does not indicate that kind of predetermination that amounts to bias. It does not amount to refusal to hear evidence or argument. It simply recognises facts; and one of these facts is that what has already happened affects what is to happen and may necessarily and inevitably operate in some degree as a restriction on the possibilities open to the tribunal cases still to come before it." [98]
> (my emphasis)

The appeal did not succeed because something more than the expression of preconceived opinions was seen as necessary to constitute bias. An appearance of bias was not seen to be the applicable test. A number of reasons can be advanced for the application of this lesser standard:

The primary difference between this tribunal and those discussed in the previous two cases is that bodies such as the Town and Country Planning Appeal Board do not always view matters in isolation. The matter of rezoning in order to establish a shopping centre will, of necessity, require much prior thought on the part of members supporting the proposal. Unlike cases such as Allinson, the actual hearing will not be the first encounter they have with the matter and, additionally, it is often as a result of their own actions in proposing or agreeing to such schemes that a hearing by way of objections takes place. Other reasons that can be advanced for this lesser standard are that it is not an individual's livelihood that is at stake; the interest involved here is the lesser right to quiet enjoyment of a street by a number of people who may be disrupted by the greater amount of motor and pedestrian traffic. Prevalent here, but absent in other cases, is the existance of an important competing interest - that of the appellant: By the time the suit was brought, the building in respect of which the application was made was partially completed, at a cost of $30 000.If the approval given was quashed, the building couldn't have been used for it's intended purpose.

If the case of Turner v Allinson provided some certainty with regard to the fact that a body which has a continuing iterest in

the subject matter for decision may require something less than an appearance of bias test, then the recent case of Rigg v University of Waikato [99] introduces a degree of uncertainty as to the applicable test.

Mr Rigg, a senior lecturer at Waikato University, together with a graduate student, had writted an article in the University's student paper alleging that inadequate supervision of the University's biology isotope laboratory had probably resulted in students dying of cancer and that the University had concealed this matter to safeguard its good reputation. A committee appointed by the Minister of Helath unanimously found that there was no relationship between the causes of death of the students and exposure to ionising radiation. As a result of this report, the University Council established a committee to consider what action should be taken in respect of the conduct of the authors of the article. The committee recommended that Mr Rigg should be dismissed. As required by the University of Waikato Act 1963, the Academic Board made a recommendation to the Council to the effect that Mr Rigg's services as a member of the staff should be dispensed with.

One of Mr Rigg's grounds for challenging the decisions of the Council and the Board was that they had been motivated by predetermination and bias. Specifically, it was alleged that they considered that the actions of Mr Rigg constituted an attack on their personal academic and professional standards and integrity. Furthermore, it was alleged that their failure to disqualify themselves from participating in the determination of proposals relating to Mr Rigg's dismissal vitiated the University's decision.

The Visitor of the University of Waikato, the then Governor-General Sir David Beattie, directed two Commissaries to inquire into the matter of the complaint and to report on the possibility of any relief to Mr Rigg. The test adopted by the Commissaries differs from that of the court in Turner v Allinson in that it is specifically stated to be a test of appearances:

> "Does it appear from all the evidence that all or any of the bodies or individuals had so conducted themselves that the informed objective observer would consider that they had closed their minds and were no longer giving genuine consideration to the live issues before them?"[100]

The Commissaries acknowledged that the natures of the Council and Board were such that they had, of necessity, a prior and continuing involvement with the subject matter of a dispute. The University of Waikato Act expressley requires Board and Council members to be the same people who are interested in aspects of the affairs of the University. Members of the School will naturally give opinions on the dispute prior to the hearing and they will contribute to determining what standards should be applied to an assessment of the authors' actions. At the same time, certain of them must also sit as members of the University's Council and Board.

The necessity and inevitability of this dual role has led the New Zealand courts in Turner and, as will be seen, in Bank and Anderton to impose tests of actual bias upon the evaluation of the reviewing court. In Rigg, the Commissaries found Mr Rigg's claim to have substance due to the test of an appearance of bias based upon the evaluation of the impartial and informal bystander. They saw that, although the dual role of

Council members (as judges and advocates) is unavoidable, it will, at a certain point, create an appearance of prejudgement or an inability or unwillingness to give the issue genuine consideration. They found that appearance to exist in this case.

This finding does not square well with the Turner decision. The Appeal Board there and the Council here are similar in nature to the extent that they both have, of necessity, a continuing involvement in the subject matter of a case. Evaluation of the consequence of this prior involvement differs. In Turner, and in Bank and Anderton, it led the courts to reject a test of an appearance of bias; in Rigg, the Commissaries regarded appearances as an essential factor.

The difference between the cases may be seen to stem from the variable of the power exerciseable by the respective bodies and, consequently, the personable rights that can be affected by any exercise of that power. In Turner, the Board could allow or disallow an application for rezoning so as to authorise the construction of a supermarket. The right affected by granting the rezoning application was that of quiet enjoyment on the part of neighbouring householders. The Council and Board in Rigg had the power, which indeed it exercised, to terminate Mr Rigg's employment. Not only did this deprive him of his livelihood but it left some definate marks on his reputation. The important nature of rights such as these is often seen by the courts as grounds for applying the more easily satisfied test of an appearance of bias. This has the effect of providing a closer scrutiny over decision makers having powers to affect such rights but has the unfortunate consequence of adding prima facie, a degree of uncertainty and inconsistency to the law.

By way of contrast, in R v Ontario Labour Relations Board ex parte Hall [101] the allegation of bias stemmed, not merely from a prior expression of opinion, but by a declaration of 'war' by a member of the Board against one of the litigants. A member of the Ontario Labour Relations Board was also president on the Ontario Federation of Labour. The Ontario FOL had virtually 'decalred war' on a small number of local unions. One of those unions applied for certification, another opposed it. The member in question was in the position of sitting in judgement on an issue, the result of which would advance or retard the declared policy of the Ontario FOL.

McRuer C J H C did not think thatthe member would be disqualified merely because he held membership in the trade union, but

> "I do not think, on any recognised principle of law applicable to judicial or quasi-judicial tribunals that one who has clearly divided loyalties, as in this case, can be permitted to act."

This case is of relevance to the observations made at the beginning of this section. The members of the Ontario Labour Relations Board are appointed on the nomination of employers or employeed under s 75(2) of the Ontario Labour Relations Act 1960. In this way, a form of built-in bias exists as a result of the nature of the membership provisions so as to allow members to have certain conflicting interests. In these cases, and in cases such as Turner v Allinson where, as a necessary corollary of the nature of the office members must necessarily acquire opions, reasonable suspicion of bias cannot be the applicable test.

3. The Actor is a Council or Local Authority

The nature of a council or local authority varies greatly from that of a court and from the nature of many tribunals because of the great number of functions it pursues. Its objects are not limited to the adjudication of disputes alone. The administrative functions of a local body include the development of a planning scheme for it's area pursuant to the Town and Country Planning Act 1977. Proposed developments must fall within the limitations set out by the scheme, otherwise, an application for permission to deviate from the scheme must be made. When such an application is made, it is the local body who must consider it, along with any objections to the granting of consent that have arisen from notification of the application. This, it is traditionally assumed, is where thejudicial function of the local body; it's power to affect rights, arises.

Unlike statutory tribunals, there is uniformity in the nature of councils and local authorities. Their power is that of decision, as to whether or not to change a town plan, pursue a construction or stop a street. The result of any exercise of that power can affect the rights of a great number of people, whether it be the deprivation of an important right, such as the need to vacate one's house, or the creation of a nuisance by way of commercial premesis being constructed in or near a residential area.

In Lower Hutt City Council v Bank [102], the Council entered into an agreement with Challenge Properties Ltd. regarding a lease of land. Included in the agreement was an undertaking on the part of the Council to take all steps necessary to stop certain streets.

If the Council was unable to stop the streets, the agreement was to be null and void and of no-effect. By virtue of s170 of the Municipal Corporations Act 1954, and the Sixth Schedule to that Act, to stop a street, the Council must prepare a plan of all streets proposed to be stopped, open it to public inspection and call upon people wishing to lodge objections. If objections are received "the Council shall forthwith after the expiration of the time limited as aforesaid, inquire into and dispose of the objections"

The contention was that the Council was so restrained as a result of their prior agreement with Challenge Properties that there was a real likelihood that they would feel constrained to disallow the objections. However, the Provisions of the Municipal Corporations Act require a Council to consider objections to its own proposal. In this way, as was seen to be the case with a number of statutory tribunals, the Council, by the intention of the legislature, is inherently biased with regard to street stopping. This does not, however, automatically preclude the operation of any rules against bias. The words "inquire into and dispose of" in s170 of the Municipal Corporations Act led the court to accept that the Council's task is not merely to act as an assembler and passer-on of facts and considerations. The Council was therefore not any less bound to apply the rules of natural justice to its decision making. It still had to act fairly. The built-in bias, however, required something less of a scrupulous impartiality.

> "We think that the state of impartiality that is required is the capacity in a council to preserve a freedom, notwithstanding earlier investigations and decisions, to approach the duty of inquiring into and disposing of the objections without a

> closed mind so that, if considerations advanced by objectors bring them to a different frame of mind they can, and will go back on their proposals."[103]

In the context of this quote, to determine whether a council has approached a matter without a closed mind requires actual proof of an operative bias. The proof, it seems, is to be determined by the court itself, for, in Bank, it was held that the extent of the council's prior involvement with Challenge Properties Ltd and the council's contracted obligations with the firm, meant that the council could not bring an entirely impartial mind to the adjudication, and so prohibition issued. Requiring proof of actual predetermination is a stringent requirement, for it is extremely difficult, if not impossible, to tell the state of a man's mind at any given time. However, if a history of negotiations can be shown and if documents can be presented to the court showing that these negotiations amounted to obligations, this task becomes less perplexing.

The applicable test in such circumstances was brought to light more clearly in Anderton v Auckland City Council [104] There, the council proposed to establish a shopping mall next to already existing shops. The problem was that the land proposed for this venture was zoned residential. Rezoning involves a public hearing of objections at which the Council itself is to be the adjudicator. The council clearly had a financial interest in the outcome of the application for rezoning, for it owned part of the land proposed to be affected and it had already entered into an agreement to lease the carpark area at $15 000 per annum and the shop sites when they became available at $10 000 per annum.

Moreover, it had been negotiating closely with an Australian company regarding the construction of the complex for a period of six years. It is impossible to deny that the association itself reflects not only a real likelihood that the hearing of the company's case would be controlled by a prejudgement but a strong probability that this result would ensue. Neither of these tests, however, were appropriate in a case such as this:

> "The tendency to favour its own scheme must have been implicitly recognised by the legislature in constituting the council the primary adjudicative tribunal and the consequence must be, as I see it, that presumptive bias is necessarily excluded as a ground for invalidating the decision of the committee. I am satisfied that what must be proved in this case is actual predetermination of theadjudicated issue." 105

In applying this test, it was held that the council had become so closely associated with the company in attempts to secure planning permission that it had completely surrended its powers of independent judgement. MahonJ went on to say that the members of the council convened the hearing with a closed mind, impervious to whatever evidence the objectors might submit and determined to uphold the validity of the commercial development.

Thus, in two recent cases, New Zealand courts have insisted that local bodies observe certain minimum procedural standards when they exercise their decision making functions. These minimum standards are secured by the test of having to prove actual predetermination or bias. As in Turner v Allison, the nature of the decision maker requires a greater standard of proof with regard to any claim of bias and requires a lesser degree of impartiality

on the part of the decision maker. Again, the nature of local bodies is the key factor: They do not view the matter in isolation, it is a result of their own actions that a hearing, by way of objections takes place, moreover, the legislature has expressley condoned this practice. A large number of people may be affected by the proposals but the interests involved are not of such importance as to require a lesser standard; a court may be tempted to impose a less stringent test if a number of people are likely to lose their homes as a result of the local authority's actions. Competing interests are often involved, especially if negotiations with a developer have resulted in some expenditure on the developer's part and, furthermore, in Anderton, the council was entitled in the due exercise of its statutory powers, to employ that land to the best advantage of the inhabitants of that part of the city; a requirement it believed would well be secured by the presence of a shopping centre.

Although it is often argued that the test of actual bias is inappropriate due to its unworkability, [106] this is not so if a decision has resulted from a history of planning and prior negotiation that is condoned by Parliament. The imposition of a lesser test would completely fetter the ability of a local authority to carry out its statutory duties in respect of town planning.

Consider again the case of Rigg discussed in the preseeding section. In a similar way to Bank and Anderton, the decision makers there, of necessity, had a prior involvement in the subject matter of a dispute. Such invlovement was similarly condoned by the legislature. There, the test of an appearance of bias was applied

by the Commissaries. The reason, it may be supposed stems from a factor just identified:- the nature of the interests that the decision makers' decision affects. It may well be that a power to deprive someone of their livelihood is deserving of a more easily satisfied standard. This factor is often not inherent in the powers of a local authority. Their decision can affect a large number of people in an indirect way; its powers are not exercised with any one particular person in mind and so the issue, and the question for a reviewing court may be seen to differ. Like the Franklin case, which is discussed in the next section, the issue often relates soley to the exercise of a discrection and not so much to the observance of the principles of natural justice. The local authority must do what Parliament has and actually exercise its statutory discretion without disclosing its mind to possible alternative arguments. If, because of an operative bias, the minds of the local authority's members are so foreclosed that such alternative arguments are not even considered, its decision may be successfully questioned.

The applicability of any judicial standards at all in certain cases by local authorities has been brought into question by the decision of Attorney-General ex relatione Benfield v Wellington City Council [107] The Bank of New Zealand exchanged certain lots of land for neighbouring land owned by the Wellington City Council. To effect the transfer, an agreement was signed under which the bank was to submit plans for a multi-storey office building for town planning approval. The agreement posed certain obligations on the council which, it was alleged, amounted to an agreement to construct the building and to assist the bank to get the necessary planning approvals. Applications for consent to conditional

use of the site were advertised but no objections were received. On this basis, the council approved the application. The plaintiff's claim was that the decision of the council did not constitute lawful planning permission because it had been motivated by bias in making its decision. Davison C J held that the degree of impropiety was too minor to warrant the remedies the plaintiff sought. The reason advanced for natural justice principles being inapplicable was that, because no objections were heard, there was no lis inter partes before the council:

> "It had no duty to act judicially in the circumstances although there can be little doubt that, had objections been raised to the bank's proposals and those objections had been pursued to the hearing, the city council would then have had a duty to the objectors to observe the principles of natural justice." [108]

Benfield then, appears to have limited the applicability of any rules against bias to cases where there is something in the nature of a lis. However, this factor has not precluded the operation of some rules against bias in other cases. In R v Manchester Legal Aid Committee, ex parte R A Brand and Co Ltd [109] (upon which Davison C J seemed to have based his decision), the committee had to decide whether to grant a certificate for legal aid only on the basis of evidence put forward by the applicant; there was nothing in the nature of a lis, yet the court decided that the writ of certiorari would lie and that the committee, in deciding to grant the certificate, was making a judicial decision. In Bank, the successful application was for prohibition; a hearing of objections never took place, yet the council was obliged to act according to some principles of natural justice: Thought had to

be given to the statutory criteria and, additionally, the power to hold a hearing could be denied if the minds of the council members were forclosed. The existence or not of a lis cannot be laid down as a difinitive test as to whether judicail principles apply. It is one factor out of many that should be taken into consideration; each case is to be jedged on its own facts.

The applicability of some rules against bias in the Benfield case can be delt with by reference to the principles in Ridge v Baldwin dicussed earlier: Does the council have legal authority to determine questions affecting the rights of subjects? Although no important rights may have been affected by the actual proposal, it is clear that, in the nature of the office of a councillor, individual rights can be affected. Applying then, the Bank and Anderton test, the question becomes - was the council motivated by actual predetermination? The facts reveal such a similarity to those in Anderton that it could easily be concluded that, due to the extent of prior negotiations withe the Bank of New Zealand, the council had fettered its discretion so that, by making a decision, its mind was closed to any other relevant considerations.

The legislation has been quick to intervene in these cases s 58 of the Town and Country Planning Act 1977 specifically allows a practice that, while not prohibited by the Town and Country Planning Act 1953, was questionable under the common law in that a local authority may hear a planning application for a development about which it has already entered into negotiations with the developer. Is the effect of s58 that local bodies have been statutorily excused from the requirements of compliance with the rules of natural justice when considering applications for planning consent? Fyfe [110] thinks not. He submits that s58 only

prevents the use by objectors of any argument based on such negotiations that there was a constructive or presumptive bias on the part of the council and that 'actual predetermination' would still be a ground for invalidation of the council's decision. Reid and David [111] agree with this approach in advocating that a statutory shield may fail to prevent actual bias. If this is so, the Bank and Anderton cases are still relevant to cases in which any defence based on s58 is raised.

In relation to street stopping, an amendment to the Municipal Corporations Act in 1978 [112] provides that if there are any objections to the council's plans, they must be referred to the Planning Tribunal. In this way, the Town and Country Planning Act permits the council to act with bias regarding planning consent, while the Municipal Corporations Act precludes a council from so acting regarding street stopping.

Possible reasons can be suggested for each of these statutory provisions which are practical in themselves but, when viewed together, provide little compatibility. Section 58 of the Town and Country Planning Act recognises, as Turner v Allison did regarding the Town and Country Planning Appeal Board and as Bank and Anderton did regarding local authorities, that it is inherent in the nature of bodies who must spend some thim considering and planning a particular development, to have formed some opinions and preferences. If practice proves to be true that this provision will not prevent actual predetermination, over and above that which is inevitable, then it merely codifies the common law position.

Conversely, the reason behind section 78 of the Municipal Corporations Act seems to be a recognition that, inevitable as some form of preconception must be, it is not conducive to an appearance of impartiality in the public eye. The response has been to split the functions of the local authority by requiring objections to be heard by an independent body. As will be seen in part D of this paper, such an approach can be seen as one of a series of moves by Parliament to create an air of impartiality in bodies that may be seen to be inherently biased. Examples will be presented, amongst others, of the recent amendment to the Human Rights Commission Act which constitutes a Proceedings Commissioner. If the Human Rights Commission is of the opinion that a complaint has substance, it may refer the matter to the Commissioner who decides whether proceedings before the Equal Opportunities Tribunal are warranted. In this way, a number of independent bodies play a part in the complaints procedure before a decision is reached.

A procedure such as this, as indeed already operates regarding street stopping, or a division within the local authority itself, whereby some members take no part in a particular development but are responsible for hearing objections to the scheme, will do much to preserve in the public eye, and in practice, the impartiality and integrity of local authorities.

4. <u>The Actor is a Minister of the Crown</u>

The comments made in relation to the nature and functions of councils apply equally, or moreso, to Ministers of the Crown. A portfolio requires a Minister to make many decisions in what he considers to be the best interests of the country. At the same

time, he is often given power, by statute, to make or confirm an order after hearing objections to it, or after objections to it have been heard. An example of this latter course is provided by sections 22 to 24 of the Public Works Act 1981. The Minister of Works may declare certain work to be essential so as to compulsorily acquire it under section 22. Any objections to such an acquisition are first sent to the Planning Tribunal under section 24 but, under section 24 (ii), the Minister may decide not to give effect to any recommendation of the Tribunal and proceed to acquire the land for a public work. The gulf separating a judge and a Minister then is the implementation, by the latter, of policy. Notwithstanding the fact that they must both hold hearings or consider the arguments of opposing parties this causes facts that would be bias in the former but not in the latter.

Again, the main conflicting interest that gives rise to litigation is predetermination of the issue. Unlike other countries, there is no specific statute or statutory provision in New Zealand regarding the financial and personal interests of Ministers. [113] The only guide in existence is the reoprt, as long ago as 1956, of the Ministers' Private Interests Committee. (This report is discussed in Part E of this paper.) The only guide, then, in New Zealand as to bias in a Minister of the Crown, is provided by the common law.

In Franklin v Minister of Town and Country Planning [114] the respondent proposed, under new legislation, to establish a new town at Stevenage. After hearing objections to the draft order, the Minister decided to proceed with the proposal. The appellants based their case on statements made in an advance press notice

issued by the respondent and statements made by the respondent at a meeting that he had, by that time, completely made up his mind that the designation of Stevenage as a new town would be carried through whatever was said subsequently. Lord Thankerton, (for the court) said:

> "In my opinion, no judicial or quasi-judicial duty was imposed on the respondent and any reference to judicial duty or bias is irrelevant in the present case. The respondent's duties are purely administrative."

and later:

> "No judicial duty was laid on the respondent and the only question is whether he has complied with the statutory requirements to appoint a person to hold a public inquiry and to consider the person's report."

Prima facie, the foregoing seems to set up the proposition that, if the nature of the function in question is labelled as administrative, it is a foregone conclusion that the principles of natural justice are inapplicable. Indeed, it is often concluded that this is the consequence of the Franklin decision. But this is not at all what the case concluded. The tag 'administrative' was used to distinguish the function from one of a more impartial nature and, notwithstanding the fact that the label was attached, Lord Thankerton went on to say:

> "In such a case, the only ground of challenge must be either that the respondent did not in fact consider the report and the objections, of which here there is no evidence, or that his mind was so foreclosed that he gave no genuine consideration to them." (my emphasis)

Franklin, then, was purely a case of a failure to exercise a discretion. It was the Minister's duty, under the New Towns Act to draft an order and make it public so that objections could be heard. After hearing the objections and receiving an interim report from a committee constituted by the Minister for the purpose of considering the proposal (the Reith Committee), the Minister had a discretion, in weighing up the various submisssions, as to whether to make the relevant order. Because "the appellants had not established that in the respondent's speech he had forejudged any genuine consideration of the objections" they had not established that the respondent had approached the matter with a closed mind, thereby failing to exercise his discretion.

CREEDNZ v Governor-General [115] came to very much the same conclusion. There, the National Development Order (No 2) 1981 applied the National Development Act 1979 to the Aramoana Smelter. The effect of the Order in Council was to enable normal statutory proceedures for seeking the necessary consents to be superseded by a single Planning Tribunal hearing, to be followed by a report and recommendation to the Minister of National Development, rather that a binding decision by the Tribunal. The plaintiffs' contention was that the Executive Council's actions and public statements were such as to give rise to a real probability and /or a real likelihood and/or a reasonable suspicion [116] that the Executive Council had determined in advance to advise and consent to the approval of the application and that, for that reason, the decision was invalid for bias.

The judges of the New Zealand Court of Appeal saw it as fallacious to regard this as a disqualification. Comments were made to the effect that projects of the kind for which the National Development Act is intended, whether government works or private works are likely to be many months is evolution and that it would be naive to suppose that Parliament could have meant Ministers to refrain from expressing, even strongly, views on the desireability of such projects until the stage of ordering an Order in Council.

Cooke J considered the only relevant question to be "whether , at the time of advising the making of the Order in Council, the Ministers genuinely addressed themselves to the statutory criteria and were of the opinion that the criteria were satisfied." In a similar way to Franklin. the Ministers, it was held, did not approach the matter with a completely closed mind. In considering the statutory criteria, they had exercised their discretion in the manner prescribed by the legislature. It is only actual predetermination that will result in a failure to give these criteria true consideration; thereby resulting in an operative bias. Richardson J concluded, to this effect:

> "A suspicion that the Executive Council might be inclined to endorse an application in respect of a government work is not enough to invalidate the decision raised under the subsection. In order to do so, predetermination of the question must be established." (my emphasis)

There is a difference between the approaches of Cooke J and Richardson J which, in some circumstances, could be significant. It turns on their respective views as to what constitutes this disqualifying predetermination or failure to exercise a discretion

and as to when such predetermination must operate.

The relevant time for assessing the question, on Cooke J's approach is at the time of advising the making of the Order in Council. Because the Ministers had concluded, at that time, that the work was essential for the major expansion of exports and for developing significant opportunities for employment, the learned judge considered that the minds of the Ministers were not closed. Richardson J goes a little further:

> "Before the decision can be set aside on the grounds of disqualifying bias, it must be established, on the balance of probabilities, that in fact the minds of those concerned were not open to persuasion and so, if they did address themselves to the particular criteria under the section, they simply went through the motions." 117

Under Richardson J's approach, it may not be enough, as Cooke J suggests, that the Ministers merely address the statutory criteria in the Order in Council. It may be that, in doing so, they were simply going through the motions. In addition, if it can be shown that, before that time, the Ministers' minds were not open to persuasion, Richardson would hold an operative bias to be present.

The nature of the duty imposed on Ministers requires this lesser test as to bias in much the same way and for similar reasons as is true of councils and a number of statutory tribunals:

- The decision maker does not view the matter in isolation, but is required by statute to have a degree of prior involvement in the matter.

- A large number of people may be adversely affected by the decision to construct a smelter or a new town but it seems that this is out-weighed by competing interests: The decision has been made in what is considered to be the public good, rather that to pursue any private interests and a great deal of employment and productivity will result from the proposals.

The extent of the nature of a Minister's functions gives rise to an even lesser standard of bias than that applicable to some statutory tribunals concerned with policy. This is evident in comparing the CREEDNZ case with the Ontario Relations Board case. The latter said that strong expressions of hostility to a party to a dispute will give rise to bias. The former case stated that even strongly expressed views in favour of a proposal would not give rise to a claim of bias.

5. The Marginal Lands Board Loan Affair - A Different Approach?

The Marginal Lands Board Loan Affair can be seen as a combination of a number of concepts discussed thus far, coupled with an evaluation of the applicable concept of bias by an ad hoc body not constrained by legal precedent.

The facts of the loan affair are that in September 1979, Mr J M and Mrs A Fitzgerald applied to the Marginal Lands Board for a loan to assist the development of a wasting property called 'Long Gully' near Wellington. The applicants were, respectively, son-in-law and daughter of the then Minister of Agriculture and Fisheries and were both friends of the then Minister of Lands, who was statutory chairman of the Marginal Lands Board.

The loan application was twice rejected by the Board and then finally granted on 17th June 1980. A member of the Board, Mr C R White, then resigned publicly declaring that the loan was well outside the Board's normal lending criteria and was granted as a result of pressure from the Minister of Lands.

The question to be decided by the Commission of Inquiry was of a different nature that that which has been addressed thus far. The Commission was required to decide whether action should have been taken against the decision in dispute. The task that faced the Commission, then, was much harder that that faced by a reviewing court: The status and reputations of two public figures were in issue. A reviewing court may strike down a decision due to bias withour doing any injury to the reputation of the decision maker. One has only to recall the words of Lord Campbell in Dimes v Grand Junction Canal [118] when he said "No one could suppose that Lord Cottenham could be in the remotest degree influenced by the interest he had in this concern ...." Lord Cottenham's decision, nevertheless was declared void for an appearance of bias.

It may well be that a finding of bias when a public figure's career is at stake should not be as easily assumed. Against this argument, however, must be viewed the directions given by the legislature in such matters. As will be seen in Part D of this paper, it is often the case that an officeholder will be disqualified if he has a private interest which has the potential of conflicting with his public duty. Whether or not that interest will in fact influence the officeholder is not a relevant consideration. Examples will be provided by section 9 of the

Victoria University of Wellington Act 1961 and section 14 of the Fisheries Act 1983. The standard adopted by the Commission, however, was one of actual bias.

The Commission of Inquiry criticised the approaches made by the two Ministers, referring to them as 'wrong', 'not correct' and 'unwise' but found none of the actions scrutinised to be actually 'improper' [119] The Primary reason for this finding is the standard of impropriety that the Commission imposed:

> "Any attempt to use that friendship or relationship so as to procure for the applicants an advantage outside the true merits of the application must in itself amount to impropriety .. in addition, it follows that whether or not there is impropriety must necessarily depend on whether the act complained of was done with the intent to procure an improper advantage. - Intent to procure an improper advantage is essential. Acting with stupidity or lack of wisdom is not necessarily impropriety." [120]

Actual impropriety, then, was the test applied. A test of an <u>appearance</u> of an influence on the proper and impartial performance of public duties was rejected by the Commission:

> "Impropriety cannot lie entirely in the eye of the beholder. There can be cases where there are all the appearances of impropriety but where there is in fact none ... For, if the situation is one where the Minister's intervention cannot, on any reasonable view, secure an improper advantage, how can it be said that there is any ground for a reasonable and impartial bystander to infer that the Minister allowed the fact or relati nship to exert an influence on the proper and

impartial performance of his duties." [121]

Such a proposition has some merit, given the fact that a Minister's career is at stake, but it does make for some glaring contradictions. Consider the case of a Minister who, inspired by a personal financial interest, attempts to intervene in the decision of a tribunal so as to influence its decision. If that intervention comes the day after the tribunal makes its decision, it would not be considered improper under this test for, in fact, it did not secure an advantage for the Minister. If the intervention has come the day before the tribunal's decision, an improper advantage would have been secured and a like inference would be drawn by a reasonable bystander. Two different results may arise out of the same improper act. It should be the fact that the intervention was improper that gives rise to a finding of impropriety, regardless of the effect it actually has. As Parliament has directed in statutes such as the Fisheries Act, it is the potential influence that should be the dominant concern.

The test adopted by the Commission aligns, in some ways, with that laid down in CREEDNZ and Franklin; there must be actual impropriety. But the Commission, in applying a 'beyond reasonable doubt' standard to this test, goes beyond that laid down by the courts. In cases where actual predetermination has been said to be required, the test has been held to be satisfied if the court is satisfied that the prior conduct of the decision maker meant that he could not approach the matter with an open mind. Although a standard of proof is not normally mentioned, Richardson J in CREEDNZ said that the decision could be set aside if it was established on the balance of probabilities that the minds of those in question on the not open to persuasion.

The question that must be asked then is, having regard to the function of the Ministers, can the standard adopted by the Commission be likened to that adopted by the courts?

Judicial authority has required proof of actual predetermination in cases where a decision maker does not view a matter in isolation but, by necessary implication of the nature of their office, must have had come prior involvement with the subject matter of a dispute. The involvement in the subject matter in the Marginal Lands Board case was not of necessity, it was not required by statute but was attributable to the private actions of the Ministers alone. Similarly, the hearing was not a necessary result of any prior actions on the part of the decision makers; the actions giving rise to allegations of bias arose because of the hearing itself.

The test of actual predetermination can arise also when competing interests that arise as a consequence of a decision are seen as more important than avoiding an appearance of bias. The only interest served by the involvement of the Ministers in this case was advancing the personal interests of their relatives and friends - a clear case for the applicability of a test of appearances.

These factors show that the Loan Affair cannot be aligned to any cases where actual bias has been held to be the test, yet the test adopted by the Commission is even more stringent and harder to satisfy than any of these cases. As Brookfield points out: 122

> "It simply does not follow that, because criticism of the conduct of certain persons "was bound to attract some publicity" the standard should be so high."

Although a different matter is in issue here; the impropriety of a Minister and not the validity of a decision, improper interference with the impartial operation of the law remains just that and cannot be cured by an inquiry into whether it is absolutely certain that the interference did, in fact, influence the Board's decision. If the test of an appearance of impartiality is too high, then the test adopted by the Commission is too low for it will only be in rare cases that a finding of impropriety will result. The test adopted views actual impact of improper interference on a decision and not the motive behind that interference. Surely it is the latter that should be avoided.

6. The Actor is a Non-Statutory or 'Consensual' Tribunal

A preliminary question to an evaluation of the law relating to non-statutory tribunals is the extent to which a court of law can interfere in proceedings that are essentially of a private nature. In theory, at least, submission to the jurisdiction of the governing body of a club, trade union or private association is the result of the voluntary acts of members in joining that club, union or association. If a member of the non-statutory body is actuated by bias, an affected member cannot complain due to his voluntary agreement to let that body judge his activities within the organisation. In contrast, a tribunal of the state imposing, without the consent of those governed, rules and decisional processes upon individuals must be subject to scrutiny

by the courts to ensure the impartiality of its members.

As will be expanded in this section, the validity of this type of argument breaks down for two principal reasons. Firstly, the voluntary or consencual nature of non-statutory tribunals may be a myth. If a member wishes to join an organisation, he will have no choice but to submit himself to the jurisdiction of its governing body. In addition, a prospective member has no bargaining strength to negotiate his acceptance of that jurisdiction; it is forced upon him in the same way as is submission to the authority of the courts of law. Secondly, the governing body may have the power to affect important rights such as a person's livelihood and status. The courts will assume an authority to review the decisions of bodies having the power to affect rights such as these.

If a court does assume the authority to adjudicate upon the propriety of members of non-statutory tribunals, the same reasons as those advanced at the opening of this section are often given as justification for a test that is harder to satisfy than is often true of statutory tribunals. de Smith [123] advocates:

> "The administration of internal discipline in educational institutions, trade unions, clubs and even professional associations is apt to present special problems. Those who make decisions can hardly insulate themselves from the general ethos of their organisation .... Application of the rules against interest and bias must be tempered with realism, for instance, it might be right to require evidence of actual bias rather than a mere likelihood of bias before a decision is set aside by a court."

The nature of consensual tribunals is often advocated as a reason for requiring the application of an actual bias test ie

(1) Non-statutory tribunals are consensual in nature. The parties have agreed to the jurisdiction of the tribunal: it has not been forced on them by statute.

(2) Unlike statutory bodies, some doubt about the 'purity' of the administration of justice by non-statutory bodies is acceptable.

(3) By choosing fellow members of their organisation to administer discipline, members accept that discipline is in the hands of persons who will necessarily have some foreknowledge of the environment in which the issue arises and of the events which led to the laying of the charges.

In the light of these factors, the recent case of Maloney v National Coursing Association Ltd [124] held actual bias to be the applicable test for non-statutory bodies. There, the plaintiff attempted to set aside resolutions of the Association expelling him as a member. His grounds were the history of hostility that existed between him and the Vice-President of the Association. The defendant's contention was that any test of an appearance of bias was inapplicable in cases such as this because the considerations which act to disqualify a member of a court or statutory tribunal are different to those applying to a domestic tribunal exercising quasi-judicial functions under the authority of rules which test upon a consenual basis.

Glass J A held that the Lannon test was of no weight regarding a domestic tribunal because Lord Denning defined the subjects of

his remarks as "---whoever it may be who sits in a judicial capacity". The learned judge advocated that cases applying the suspicion of bias tests have no application to the case of a domestic tribunalestablished by private contract. This proposition itself raises an anomoly in that the defendants conceded the fact that the nature of their functions were quasi-judicial, yet Glass J A would not apply Lannon, because he thought it to be confined to 'judicial proceedings'. Glass J A went on to base his finding on the case of

Australian Workers Union v Bowen (No 2) [125] where Dixon J said:

> "It is important to keep steadily in mind that we are dealing with a domestic forum acting under rules resting on a consensual basis".

Bowen ended by saying:

> "It is not in accordance with the rules of natural justice to have present as a member of the tribunal a person who has promoted the charge and who supports it as a prosecutor or one who is inevitably biased against the accused as a result of his participation in the controversy".

In Maloney, Glass J A made note of the fact that there was no reference to reasonable suspicion in Bowen. He uses this to support the proposition that the requirements of natural justice are, in some respects, different where domestic tribunals are concerned and actual bias is the applicable test.

It is highly questionable, however, whether the Bowen Case can be used as authority to support such a proposition. In Bowen,

the Secretary of the Australian Workers Union presented to the council, as prosecutors, charges against certain members, as a result of which those members were expelled from the union. As a member of the Council, the secretary also took an active part in the hearing of the charges. On the facts of the particular case, it was held that the secretary was actually biased; it was not said that actual bias was the test they applied; it was not said whether something less than actual bias would have led the court to the same conclusion. The case then is very dubious authority for the applicability of an actual bias test to consensual tribunals.

Maloney aside, the line of authority seems to point in favour of a test that is not so hard to satisfy.

Taylor v National Union of Seamen [126] was another case of expulsion from a union. after the hearing of the appeal and the plaintiff leaving the room, the Secretary made a long statement concerning matters outside the charge against the plaintiff which were prejudicial to him. The plaintiff had no opportunity of answering. Allegations of a breach of natural justice and of bias as a result of the secretary acting as both judge and prosecutor were brought. The question for the court was whether these judicial principles were applicable to a Union. Ungoed Thomas J outlined the dual aspects of the matter at hand: On the one hand, as an official and employee and servant of the union, subject to dismissal at will and pleasure, the rules of natural justice are inapplicable. [127] On the other hand, the consequences of dismissal for misconduct would have

affected his eligability for office or membership in the union for which membership would otherwise qualify him and this aspect of him position attracts the rules of natural justice. The weight of the courts reasoning focused on the latter point - the important personal rights which can be affected by exercise of the Union's powers;

> " The result of this appeal was indisputably of great importance to the plaintiff. His work was work for which he had trained and the National Union of Sea men was the orgainisation in which he was best qualified to pursue his career. The duty of the Executive Council was, in my view, to decide judicially as to whether or not the complaint against the plaintiff was well founded" [128]

On this basis, the hearing was found to be contrary to the rules of natural justice and a declaration was made that the Union should not treat him as if he were dismissed for misconduct. This is one of the rare cases where a reviewing court has actually granted the remedy sought by the plaintiff. [129] The general rule, as stated in Isitt v Quill, is that, even if the decider is too inherently biased for the matter to be sent back by Mandamus, the reviewing court cannot actually decide the matter and grant the plaintiff his remedy, but can only issue certiorari to quash the previous decision.

Stollery v Greyhound Racing Control Board [130] is a case of similar facts to Maloney, but reaches a very different conclusion. A member of the Board brought charges against a

greyhound owner. The board deliberated and discualified the appellant for twelve months. The member instigating the charges was present in the boardroom throughout the deliberations but took no part in them. On the Maloney test, this fact of non-participation would lead to a finding that there was no actual bias and that any claim as to bias must fail. However, in Stollery, Barwick C J had this to say:

> " The most important feature of the matter is the appearancewhich his continued presence in the boardroom during the time the matter was discussed and the penalty agreed upon must present to any reasonably minded man who knew the facts antecedent, to the hearing but who was completely unaware of what had occurred in the boardroom. The reasonable inference to be drawn by the reasonable bystander in that situation was that the member was in a position to participate in the Board's deliberation - - - The existance of that realonable inference, in my opinion, is sufficient warrant for contending that, in a matter in which the Board was bound to act in judicial matter, natural justice was denied" (My emphasis)

Unlike Maloney, these authorities apply the judicial standard as a result of the powers such bodies have to affect an individual's rights. The importance of this power has led the courts to apply appearances of bias tests, in fact, Barwick C J, in Stollery, used R v Sussex Justices, ex parte McCarthy to support his proposition.

It remains, on the basis of the nature of non-statutory

tribunals outlined at the beginning of this section, and upon the basis of cases preceeding this section, to evaluate what test should be applicable to these tribunals.

- Disciplinary tribunals weild great powers, being able to deprive a person of their livelihood. They do so in accordance with powers that they, themselves impose. In theory, these powers are based in contract: Members of the body have supposedly contracted to give them such powers. But, in practice, there is no choice on the matter. The 'contract' is a standard form which one must adhere to if wishing to become a member of the organisation. The parties are not on equal bargaining terms, there is no chance to negotiate. The rules are imposed on the members in the same way as one is bound to recognise the authority of public courts. (There may, however, remain truly voluntary organisations to which these arguments do not apply). It is useful to contrast this postition to that of arbitration. Ordinarily, upon choosing an arbitrator to a possible dispute, the parties are on more or less equal bargaining terms. In Canterbury Pipelines Ltd v Attorney-General [131], Richmond J provided three rules:

(a) prima facie, the arbitrator is disqualified by presumed bias,

(b) but if the parties have contracted to appoint him, they are bound by that contract,

(c) unless 'extra' bias can be shown beyond what must have been assumed to exist at the contract date.

However, in 1938, an amendment was made to the Arbitration Act which outruled the logical applicability of Richmond J's rules. This provided

that where a contract provides for reference of disputes to a named arbitrator and after a dispute has arisen and any party applies to revoke the submission because the arbitrator is not impartial, it shall not be a ground for refusing the application that the appellant knew of the possibility of particulity when he entered into the contract. Hence, pre-knowledge as to the arbitrator is put aside and the normal rules as to bias are left to apply: If there is a reasonable suspicion of bias in the arbitrator, the arbitration should not succeed.

Hence, even when it is clear that the parties are in equal bargaining positions to choose their adjudicator, the test of an appearance of bias is applicable. Even if the legislature had not so intervened in the matter, the fact of equal status in the choice of adjudicator constitutes a fundamental difference to the actuality with regard to non-statutory tribunals. It may be contended that actual bias should apply to arbitration, but not with regard to non-statutory tribunals. In these respects, consensualism can be seen as a fiction. Tracey [132] submits:

> "It is hard to see how public policy, which demands the appearance of fairness and purity from statutory bodies should require anything less from non-statutory bodies who have the power to affect an individual's capacity to earn a living."

It can be said in reply, however, that judicial principles cannot apply because it is inherent in the nature of a consensual tribunal that the members chosen to administer discipline may have had previous dealings with the members who are in dispute. Although courts can deal with matters in which judges have a general

background knowledge and some statutory bodies are required to be familiar with the general affairs of the matter over which the exercise jurisdiction, personal knowledge of and involvement in the facts leading to a dispute are not inherently noteable qualities of these bodies.

Tracey submits that the reasonable suspicion of bias test should be applicable to non-statutory bodies. He suggests that this will not necessarily mean that the member raising the objection will succeed - he will be met by the doctrine of necessity. The most the law will do for him is to construe the rules and ensure that the suspicion of bias has been created by the rules and not by the voluntary acts of the member in question.

This contention has merit but does not rest easily when comparing the nature of non-statutory tribunals with that of some statutory tribunals and local authorities. An actual predetermination test is imposed on these bodies because a matter is not viewed in isolation; the deciders will, of necessity, have some prior involvement with the case. The same is true of a non-statutory tribunal, whose members will be familiar with the facts of a case before any hearing. The hearing held by a local authority is often attributable to their own actions; without their prior activity, no hearing would be necessary. The same can be true of non-statutory tribunal members who often bring a claim themselves. An appearance of impartiality in the public eye is not as necessary in a private body administering internal discipline. An oversight or wrong actin on their part will not result in public dissatisfaction with the Machinery of Government.

The nature of these bodies seems to require something more than a reasonable suspicion of bias test, yet the effect of an adjudication can mean that the courts are more willing to impose a lesser rest in order to preserve personal freedoms.

7. Tying in the Variables

(a) The Nature of the Actor

If impartiality in an officeholder is seen as his most important attribute and hearings or meetings to determine the rights of litigants is the officeholder's primary, or only, function, natural justice requires the application of a test of reasonable suspicion of bias.

If , however, the functions of officeholders are more varied, to the extent that it is their own actions that give rise to a hearing and, regardless of this fact, there is a statutory, or other, duty to proceed with this hearing, it is often seen as in-appropriate to apply a test of appearances for this would render the functions of the body in question completely unworkable. Actual predetermination is often the tag used to describe the degree of bias necessary for disqualification of a member or invalidation of a decision, but this may vary a little according to the particular officeholder in question.

Statutory Tribunals The nature of a number of statutory tribunals are very much akin to that of a court to the extent that opposing parties will present their cases to an independent adjudicator.

It is often the case, however, that the tribunal must, of necessity, have an amount of prior involvement in the subject matter of a case. This was especially true of Turner v Allison, Rigg and the Ontario case. Without going as far as to classify the applicable test as predetermination, bias will be found when the personal actions of members go beyond that appearance of bias specifically allowed by statute. It is, then accepted that there will often be an appearance of bias. This was not true of the Commissaries evaluation in Rigg but the adoption of a test of appearances there may be offset by other variables.

Councils and Local Authorities An outward appearance of bias must be tolerated for two primary reasons. The first is that the members of local authorities may be elected to office on a particular mandate. Favouring a particular proposal may be attributable to that mandate and not to an operative bias. Secondly, the legislature expressley requires local authorities to have prior involvement in particular proposals and developments as well as requiring certain of their members to hear objections to the same proposals and developments. The inevitability of this dual role sees the test being bias or predetermination based upon the evaluation of the reviewing court. The question becomes, was the prior involvement of council members such that they approached their statutory duty to consider objections to their proposals with a closed mind? The competing interests are, on the one hand, safeguarding the rights and interests of concerned persons and, on the other, the need to promote efficiency and rapid decision making processes.

Ministers of the Crown In much the same way as a local authority, a Minister may have a duty to his electors to see a policy of his government carried through. It may often be that what results is an appearance of partiality towards a particular cause. Moreover, a Minister may have had a great deal of involvement in the subject matter of a case before he is statutorily required to exercise his discretion in that respect. Actual predetermination will result in a failure to exercise that discretion. A finding of actual predetermination will result if a reviewing court considers that a Minister has approached a matter with a closed mind and has failed to address himself to the relevant statutory criteria.

Non-Statutory Bodies The members of non-statutory bodies play an active role in the day to day activities of their organisation. As a result, they will be familiar with, and may have acquired views in relation to, the issues and subject matter of a case. Unlike the tests applied to other officeholders who have, of necessity, prior involvement with a case, the standard of an appearance of bias has become prevalent. As with the Rigg case, this may be attributable to other variables.

(b) The Types of Powers

The greater effect an exercise of power will have on personal rights and liberties, the less stringent the proof of bias will be. It is often the case that the decision of a statutory tribunal, local authority or Minister is directed at a particular construction or development. As a consequence, the rights of a

number of people may be affected. The extent of these rights is normally only some disturbance with the right of quiet enjoyment of land. The development and subsequent publicity may be a nuisance. As personal liberties are not damaged in any serious way, a test of actual bias is often considered necessary so as not the fetter the ability of an officeholder to carry out the duties of his office. This was true of Turner v Allison, Bank, Anderton, Franklin and CREEDNZ. If important personal rights and liberties are affected by the exercise of a power, this fetter may be displaced by the need to maintain an appearance of impartiality. This was true of the Rigg case and of many cases involving non-statutory tribunals. The important personal rights affected in these cases were the deprivation of livelihood.

There are exceptions to every rule however and it should be noted that in both Rosenfield and Allison , the courts would not lower the standards of the tests applicable to preclude the medical practitioners from being struck off the register.

(c) The Conflicting Interest There are two basic types of conflicting interest. The first stems from the previous involvement of an individual member of a tribunal with a litigant or with the subject matter of a case. If this previous involvement is attributable to circumstances such as a personal relationship or a private financial interest, the courts will insist upon an appearance of bias being the operative test. If however, the conflict arises out of statute, as is the case with some statutory tribunals requiring members to be chosen from an organisation over which the tribunal has jurisdiction, an appearance of bias test will normally bow in favour of necessity.

The second type of conflicting interest is predetermination stemming from an earlier involvement with a particular situation. As stated earlier, this conflict will often arise of necessity and is often expressley provided for in statute. In the absence of any important rights and liberties being affected by a decision that results from such a conflict, the applicable test will be one of actual bias based upon the evaluation of the reviewing court.

D. LEGISLATIVE ATTEMPTS TO REGULATE BIAS AND INTEREST

There is no one piece of general legislation in New Zealand regulating conflicts of interests in public officeholders. There are, however, may scattered statutory provisions serving this purpose in relation to particular bodies or groups of bodies. This section will initially give some examples of instances where the legislature has created a form of built-in bias. It will move to show attempts by the legislature to create appearances of impartiality in bodies which would other-wise have had conflicting duties and, finally, will provide a cross-section of statutory provisions regarding the consequences of a conflict of interest.

1. Provisions Designed to Promote Impartiality

As previously seen, one of the main grounds for invoking the nemo judex doctrine is that someone has acted as both prosecutor and adjudicator in a particular matter. Similar arguments can be raised if a body investigates a matter and then, after making a decision that proceedings are warranted goes on either to hear the matter or to prosecute it before another body. The implication of such proceedure is that, upon investigating the matter, the body will already have reached a

conclusion and so, any hearing would not be impartial. It is often the case that the legislature expressly provides for such an intermingling of functions.

One example of this is provided by the Australian Ombudsman Act 1976. Section 11 provides that the Ombudsman may investigate a complaint and decide whether of not the matter should be referred to the Administrative Appeals Tribunal and can then take the matter to the Tribunal himself. Similarly, section 30 of the Canadian Access of Information Act 1982 provides that the Information Commissioner shall receive and investigate complaints regarding refusals to access (under subsection (3) he may inicate a complaint himself). Then under section 42, the Information Commissioner may apply to the Federal Court for a review of any refusal to disclose information and may appear before the court with regard to that matter. [134]

Although it is virtually impossible to challenge such practices incourt, due to the doctrine of necessity, Parliament itself has, in a number of cases, set in practice procedures designed to promote impartiality. This usually involves the appointment of another, independent, office-holder who is entrusted with the function of deciding whether a case is of sufficient substance to go to a hearing.

Section 18(1) of the Commerce Act 1975 establishes an Examiner of Commercial Practices. Pursuant to sections 38 and 61, the

Examiner is to investigate and report on certain trade practices and monopolies.[135] If the Examiner considers it to be in the public interest, he may furnish a report to the Commerce Commission[136] which is to consider the report and reach a final decision.[137] There are, then, two examinations of the matter, one by the Examiner and one by the Commission as a result. The Commission does not investigate the matter, decide whether or not to proceed and hear the matter. An air of impartiality and detatchment is thereby created.

In a similar manner, section 34 of the Dental Act 1963 constitutes an Investigation Committee. This way, the Dental Council, who may appear to be inherently biased due to the fact that it consists wholly of dentists (and one medical practitioner), does not deal with a complaint from start to finish. Investigations Committees consist of four registered dentists who are not members of the Council.[138] Any complaint regarding a dentist is made to the Crown Solicitor who is to make preliminary investigations and may, if he considers the evidence is sufficient, refer the matter to an Investigations Committee.[139] The Committee investigates the complaint and reports it's findings back to the Solicitor General who may recommend that the matter go before the Dental Council.[140] It is then for the Council to finally decide whether the dentist is guilty of professional misconduct or infamous condut. In this way, up to four independent persons and bodies can play a part in the complaint process before a decision is reached, thereby, preserving in the public eye, and in practice, the integrity of each.

A recent amendment to the Human Rights Commission Act 1977 has secured a similar degree of impartiality. Under the original scheme, the Human Rights Commission was to investigate a complaint and if it was of the opinion that there was a breach of the Act, it was the Commission who was to bring any civil proceedings before the Equal Opportunites Tribunal. The Human Rights Commission Amendment Act 1981 substituted a new section 37 to the Principal Act. Section 37(1) to (3) provides that, if the Commission is of the opinion that a complaint has substance [141] and it is unable to secure a settlement, it may refer the matter to the Prodeedings Commissioner. It is then for the Proceedings Commissioner to decide whether proceedings before the Equal Opportunities Tribunal are warranted. This intermediary step precludes the Human Rights Commission from being both judge and prosecutor in the same cause.

It is of much interest to note the proceedure that is applicable in Canada under their Human Rights Commission Act 1977. The Canadian Human Rights Commission is empowered to designate an investigator to look into a complaint and, if satisfied that the complaint has been substantiated, it may appoint a tribunal to incuire into the complaint. The commission may be a party to the proceeding before that tribunal and take the position that the complaint should be supported. Overall, there is a reasonable apprehension of bias [142] on the part of the tribunal, for the Commission does not appoint a tribunal unless, pursuant to s 36(3) of the Act, the complaint is 'substantiated'. Nevertheless, as the Act expressley authorises the proceedure giving rise to the apprehension of bias, a court cannot interfere with that proceedure.

In MacBain v Canadian Human Rights Commission et al [143], the court found that the application of the stature in a case where the Commission appoints a tribunal after determining that a complaint is substantiated is not a violation of s 2(e) of the Canadian Bill of Rights, guaranteeing a fair hearing in accordance with the principles of natural justice. Additionally, it was held not to be a violation of s 7 of the Canadian Charter of Rights and Freedoms, guaranteeing the right to life, liberty, security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. Moreover, the proceedure was held not to violate the guarantee in s 11(d) of the Charter that every person charged with an offence has the right to be presumed innocent until proven guilty by and independent and impartial tribunal.

Collier J gave few reasons for these findings:

> "I confess I have, with that conclusion, probably contributed further to the Bill of Rights' lamentable history. I may well deserve Lord Denning's maginificant epithet of 'timorous soul' or even the sobriquet 'craven'. So be it. In partial self defence, I suggest the Bill of Rights is an akward statute. That is all it is : a statute. It has no real fangs. It is, as phrased, a tool for construction of legislation, not for destruction of impingements on rights". [144]

Given this judgement then, the questions arises as to what effect New Zealands draft Bill of Rights may have on bodies

or officeholders who are, by virtue of statute, inherently biased. There are two relevant provisions: s17 (1) of the draft Bill provides that everyone charged with an offence has the right to a fair and public hearing by a competent independent and impartial court. This is of no conern for the purposes of this paper as it refers to criminal matters with which this paper is not concerned.

Section 21 of the draft Bill provides that everyone has a right to the observence of the principles of natural justice by any tribunal or public authority which has the power to make a determination in respect of that person's rights, obligations or interest prescribed or recognised by law. Most of the cases considered in this paper have not completely disregarded the principles of natural justice when ruling on determinations made by public officeholders. The issue has been as to what extent they are applicable in given cases. In other cases, natural justice has not been in issue or has been rendered meaningless in cases such as Franklin. Instead the issue has turned purely on the issue of whether or not s discretion has in fact been exercised. For these reasons, s21 would not present a problem to the continued application of these principles or to the creation of statutory bodies or public officeholders who may be, due to the nature of the office they hold, inherently biased.

2. Provisions Regarding the Concequences of a Conflict of Interest

New Zealand legislation provides a number of concequences for an officeholder who is found to have a conflict of interest. The first two speak to situations where the private interest is of such a nature that is conflicts with the entire function of

the public office. The concequences in this situation are disqualification of the officeholder or to allow the interest to stand. The second two concequences speak to situations where the private interest causes a conflict in a particular case only. Here, the interrelated concequences are to disclose that interest and either to stand down for the purposes of the particular case or to abstain from voting in the matter.

The responses the law provides to a conflict of interest in this section are directed to an officeholder himself so as to preclude a conflict from existing and to act as a disincentive to an officeholder who may subsequently acquire a conflicting interest. To this point, the focus of the paper has been, with the exception of the Marginal Lands Board Loan Affair, on the effects bias may have on the decision itself. We turn now to the decision maker.

(a) Disqualification Provisions as to disqualification do two things: First, they preclude a person holding a particular interest from being appointed or elected to a public position. Secondly, if a person in a public positin subsequently acquires such an interest, he is automatically disqualified from that position.

Section 9 of the Victoria University of Wellington Act 1961 provides that no person in the employment of the University shall be eligble as a member of the University Council unless he is the Vice-Chancellor, the Deputy Vice-Chancellor, a member appointed by the Professional Board or a member elected by the accidemic staff of the University.

Section 14 of the Fisheries Act 1983 provides that no person shall be qualified for appointment as Chairman of the Fisheries Authority if he is financially interested in the fishing industry. Secondly, if any person appointed as Chairman becomes financially interested, his office beomes vacant. s 14 (3) provides a list of circumstances in which a person is deemed to be interested in the fishing industry; which includes owning a fishing boat, catching fish for the purposes of sale or having any involvement with a company which pursues any of these interests.

Section 3 (1) of the Local Authorities (Members' Interest) Act 1968 provides that no person shall becqme capable of being elected as a member of a local authority or one of its committees if he had entered into contracts with the local authority or one of its committees that exceeds a value of $25,000 in any financial year. Section 3 goes on, at some length, to define what does and does not constitute an interest between a local authority and an incorporated company. This includes interests on the part of a member or prospective member's spouse.

As well as being automatically disqualified from office, section 5 provides liability upon summary conviction to a fine not exceeding $200 for anyone acting in any manner while disqualified under secion 3 (1).

The Electoral Act 1956 makes it an offence for a Public Servant to be a Member of Parliament. The Act provides a procedure to be followed upon a public servant wishing to become a candidate for election. Section 30 provides that, upon being

nominated as a candidate for election, a Public Servant is to be placed on leave of absence. During such time, he is precluded from carrying out any official duties and is not entitled to any salary or remuneration as a public servant. Section 31 provides that, if a Public Servant is elected as a Member of Parliament, he is deemed to have vacated his office as a Public Servant. In the reverse situation, section 26 provides a fine of $200 for any Member of Parliment who sits or votes after he has taken up a position as a public servant.

These statutory provisions preclude any possibility of bias arising at the outset and, equally importantly, preclude any appearance of bias, the presence of which can undermine public confidence in the Government and its institutions. However, there is the risk that the community loss from an expert's disqualification exceeds the community risk arising out of his personal interest in the matter at hand, A balance must be struck between the national interest in using its best experts and the national interest in protecting the public against dangerous conflicting personal interests.

(b) Allowing the interest to continue There are few statutory provisions that acknowledge the existence of a conflicting interest and then specifically allow that interest to continue. The only circumstances in which this will be condoned is if the interest arises out of the nature of the public body's functions and not out of the private interests of its members. An example of this has already been discussed - section 58 of the Town and Country Planning Act 1977 which validates any action by a Council in negotiations with a proposed developer before it is required

to hear objections to an application for planning consent. One interpretation of this section is that local boeies have been statutorily excused from the requirement of compliance with the rules of natural justice when considering such applications. It can be argued however [133] that the proper scope of section 58 is that it only prevents the use by objectors of any argument based on the prior actions of a local authority that there was any presumptive bias (real likelihood or reasonable suspicion of bias(on their part and that it will not preclude ' actual predetermination' from operating as a basis to invalidate the local authority's decision.

(c) Standing down for the purposes of a particular case In bodies where a particular interest will not render a member interested in every matter that comes before it but will only cause him to have an interest in a particular case, he may be required to stand down from or abstain from voting in that case.

Section 46 of the Police Act 1958 provides that no member of the Police Appeal Board shall sit on any appeal affecting himself and, except with the consent of the appellant, shall not sit on any appeal relating to promotion if he was a member of the Promotion Board which made the determination appealed against or on any appeal if, in the course of his duties, he has conducted any inquiry or investigation or made a report regarding any misconduct which is the subject matter of the appeal.

Section 6(1) of the Local Authorities (Members' Interests) Act 1968 provides that a member of a local authority, or one of its

committees, shall not vote or take partin the discussion of any matter in which he has a pecuniary interest, other than an interest held in common with the public. For the purposes of subsection (1), where an incorporated company has a pecuniary interest in a matter before the local authority, a member of the local authority is deemed to have a pecuniary interest in the matter if he or his spouse own 10 per cent or more of the issued share capital of the company, is managing director of the company or a controlling company.

Perhaps one of the most complete and succinctly worded provisions in this respect is section 10 of the Rural Banking and Finance Corporation Act 1974. This provision is worth setting out in full:

> "Disclosure of interests (1) Any director of the Corporation who, otherwise than as a director, is directly or indirectly interested in arrangement made or entered into, or proposed to be made or entered into by the Corporation shall, as soon as possible after the relevant facts have come to his knowledge, disclose the nature of his interest at a meeting of the Corporation.
>
> (2) A disclosure under this section shall be recorded in the minutes of the Corporation and, except as otherwise provided by resolution of the Corporation, the director -
>
> (a) Shall not take part after the disclosure in any deliberation or decision of the Corporation relating to the arrangement or agreement and
>
> (b) Shall be disregarded for the purposes of forming a quorum of the Corporation for any deliberation or decision".

Abstaining from taking part in deliberations regarding a dispute will necessarily require a disclosure of an interest in the matter but the above section makes quite clear the extent of detachment necessary after making such a disclosure. A full disclosure of the extent of the conflicting interest is not required; only a disclosure of the nature of that interest. As will be seen in the next section of this paper, disclosure alone is often recognised as sufficient action for a conflicting interest in may government functions, but where that function involves the making of a decision with the power to affect peoples' rights, the following abstenance from any further participation in the matter is required also. The effective operaion of these provisions will greatly reduce the litigation that flows in their absence.

B. FURTHER MECHANISMS FOR REGULATING CONFLICTS OF INTEREST

1. Introduction

This paper has shown that it is often the case that the common law rules that regulate bias and interest in officeholders cannot fully apply to positions where forms of bias and interest are inherent. However, to ensure that at least minimum standards of impartiality are observed, committees in several countries were established to lay down guidelines so as to avoid conflicts of interest, both within statutory tribunals and on the part of Ministers and Members of Parliament. Members of Parliament are a category of officeholders that have not been addressed thus far in this paper. The reason for this is that they do not, of themselves, make decisions that affect the rights of others.

They exercise influence only. This they do by speeches and votes in Parliament, activities in the party room and party committees any be representations to Ministers and their advisors. The reason for the inclusion of Members in the terms of reference of the various committees studied here was to create methods to maintain the high standards of respectability, both in practise and appearance, that are important in those persons elected to represent the interest of the country as a whole. Collectively, Members of Parliament represent a formidable power.

The creation of these committees represents a complete turnaround in attitudes towards the regulation of conflicts of interest in public positions: In Britain in 1969, the Select Committee on Members Interests considered that

> "The real choice is either to establish a cumbrous inquisitorial machinery which is likely to be evaded by the few members it is designed to enmesh or to improve and extend the traditional practices of the House."

The latter course was chosen. The turnaround was formulated in 1974 by two resolutions of the British House of Commons establishing machinery for the declaration and registration of Members' private interests. In proposing these resolutions, the Attorney-General said to the House that the change of approach was necessary because

> "The smoke of suspicion which surrounds the fire of real or imagined corruption is a grave suspicion which we face, not because we are more corrupt or more of us are corrupt than we ever were five years ago but because corruption spreads like an odour which attaches to the guilty and innocent alike."

It si first necessary to determine the types of bias and interest we seek to regulate. These come under two specific heads:

- Non-pecuniary interests

Although an officeholder may find it abhorrent to feather his own nest with improper gifts or dubious decisions, he may be tempted to assist an industry of organisation with which he is associated or to help a friend or relative. The problem with these types of interest is that they are nebulous and hard to define. The New York Bar Association said [144]:

> "Restriction on outside economic affiliations can be written with reasonable particularity and enforced with moderate predictability, but no one has yet devised a method of sorting out friends acquaintances, relations and lovers for the purpose of a rule permitting the official to deal with some and not with others."

The Australian Committee of Inquiry into Public Duty and Private Interest [145] put forward a test of appearances very similar to that adopted by the common law: Does that interest look, to the reasonable person, to be the sort of interest that might influence? To this was added the caution that every effort should be made to ensure that the intrusion into the privacy of others is minimised.

Matters that the committees did not consider are the more general political and ideological interest. Interests such as these are even more nebulous. Moreover, unless an officeholder makes his interests known, they are virtually impossible to trace. If such interests are make known to the public, it will be for the public to decide whether they are acceptable in public office.

Short of disqualification, interests such as these cannot be effectively regulated by the mechanisms suggested in this section.

- Pecuniary interests

Here, it is possible to be more exact in terms of definition. Three areas can be identified:

(a) Assets There are two extremes. The first is domestic assets. These include house, car furniture etc. The second is sensitive assets ie. Assets which have a particularly close relationship with the duties of the officeholder. Bewteen these two fall other varying forms of personality and realty in respect of which there is room for debate as to their inclusion or exclusion.

(b) Liabilities These should be treated in the same way as corresponding assets: A mortgage on property should be treated in the same way as ownership of the property; a loan from a firm who profitability was influenced by an official's department should be regarded as a sensitive asset would be.

(c) Outside income Private payment for carrying out official duties may constitute bribery and be caught by the crimial law. Regarding payment not directly related to official duties; a conflict may arise from the misuse of confidental information reveived in an official capacity so as to further the source of that income, or from the influencing of government activity so as to benefit that income. A second point for consideration is the demands made on an officeholder's time and energy by extramural activities. As will be discussed under the

heading of divestment, it is often the case that outside employment is specifically prohibited.

Doig [146] terms the outside interests of Members of Parliament as not only their most marketable but their most vulnerable commodity. Some examples can be provided to illustrate this proposition.

Mr Reader-Harris, a past British Minister of Trade and Industry, was invited to become an armchair director of a group of pig breeding companies. It is alleged that he was so invited so that the group might have the benefit and prestige of have a former Minister on its Board of Directos. Reader-Harris received £2,500 per annum, a no-limit credit card and interest-free loans. The company collapsed, owing £1.2 million through bad management and fraud. This so reflected on Mr Reader-Harris that his local Conservative Party declined to readopt him.

In 1971, Jeremy Thorpe, Liberal Party leader, jointed a fringe bank-London and County Securtities ltd. It provided £5,000 per year, plus a car and business expenses, in return for his opening in-store banks with the attendant publicity and aura of public respectability for the company. The bank collapsed in 1973 because it made speculativeloans, loaned long and borrowed short and was involved in fraud. Mr Thorpe was cleared, but it remains a tale of caution, for it could very well have led to the collapse of his public life.

Edwar du Cann, Tory M P for Taunton was an astute and successful businessman, He was secretary and director of the National Group

of Unit Trusts. Among many other business seccesses, he plucked the International Life Insurance Company from a group of overseas conglomerates. He was careful to avoid conflicts of interests and, when appointed to a Ministerial position in 1962, he resigned his business appointments and sold his shares. Nevertheless, his decision not to accept office in the 1975 Thatcher shadow cabinet came as a relief to may who feared that his financial career might be used as a weapon against him and his party. They were aware that the entrepreneurial style typified by Mr du Cann was not a desirable asset on the Tory front bench.

Cases such as these illustrate the value of having some machinery to regualte outside interests for the appearance of impartiality in the public eye, for the effective and efficent operation of government and often for the benefit of the member himself. There are, however, difficulties in laying down common measures for all categories of officeholders: The Westminster system is based on the sereration of powers - Ministers have the characteristics of elected Members of Parliament and some of the characteristics of public servants. In the United States, the executive, the legislature and the judiciary are separate and co-equal by design and the upper levels of the executive branch are manned by relatively short-term political appointees. When statutory tribunals and local authorities are added, a wide variety of differing functions producing different interests that may be in need of regulation come to light.

2. Specific Alternatives.

Codes of conduct and methods such as declaration and registration, although sometimes provided in statute, are all forms of self-regulation; as opposed to defining a conflict situation in a statute and providing a legal sanction. The Salmon Committee [147] preferred the former method, saying that:

> "'Esprit de corps' can be seriously damaged by systems of regulation and scrutiny so rigorous that they inhibit leadership by management and imply that people working in the organisation are unworthy to trust."

This has been the attitude adopted by committees established to suggest means for the regulation of conflicts of interest. These committees provide, collectively, four 'solutions'. These embody two aspects:

1. Removal of the interest; by divestment, disqualification or suspension;
2. Regulation of the interest; by declaration and/or registration.

(a) Declaration

Declaration is a written or oral disclosure of a relevant interest at the time at which it might conflict. If a potential conflict of interest is envisaged by an officeholder, disclosure to his colleagues provides information with which they can assess his motives in relation to his decision or advice. This form of safeguard was adopted in New Zealand in the Report of The Ministers Private Interests Committee 1956 [148]:

"(b) A private or personal interest properly retained should be disclosed in Cabinet if any matter of public business coming up for consideration impinges on it and the Minister should not take part in the discussion or be a party to a decision on the matter".

There is, however, no specific rule of Standing Order in New Zealand to this effect.

A resolution of the British House of Commons on 22 May 1974 [149] expressed the obligation in the following terms:

"That in any debate or proceedings of the House or its committees or transactions or communications which a member may have with othere Members or Minister or servants of the Crown, he shall disclose any relevant pecuniary interest or benefit of whatever nature, whether direct or indirect that he may have had, may have or may be expecting to have".

The advantage of an ad-hoc declaration is the information is available when required and is made available only to those who need to know. The probelem is enforcement; it is a matter of trust for an officeholder to do the proper thing. A requirement for declaration in respect of all officeholders will do much to increase public confidence in government. In addition, the value of the information is advanced by this method- there is no need to search for one meaningful item in a register containing a general disclosure of all interest. Unlike registration, declaration does not require additional staff or

expense. The Public Duty and Private Interest Report recommended that a requirement of disclosure should apply to office-holders across the board.

For Members of Parliament, declarations should be automatically recorded as part of the official record and indexed in Hansard for convenience of reference. For Ministers, the declaration should be noted in the Cabinet records. The Minister should then either indicate that he will not take part in the discussion in question or else he should secure the explicit authorisation of his colleagues for taking part. For statutory tribunals, a provision in requiring the declaration of all relevant pecuniary interests to the Chairman of that body should be standard in all statutory provisions establishing such tribunals. Chairmen of statutory bodies and single member bodies should disclose such interests to the Minister. Each statutory body should supplement any statutory disclosure requirements with its own rules, adopted by resolution or otherwise, covering such matters as the disclosure of relevant non-pecuniary interests. It is particularly in relation to statutory tribunals, whose nature and functions vary, often greatly, that uniform sets of rules become unmanageable.

The Local Authorities (Members' Interest) Act 1968, as previously noted, requires, by virtue of section 6, the disclosure of relevant interests.

Responsibility for financial probity has remained largely with audit.

Section 8 of the Act specifies the Audit office is to be the controlling authority for these provisions. Section 33(1)(b)(ii) of the Public Finance Act 1977 requires the Controller and Auditor-General to report to Parliament each year in relation to the performance of his functions, duties or powers under any Act. In this way, the private dealings of members of local authorities and the general workability of the Local Authorities (Members' Interest) Act will be brought to Parliament's notice. As a result, Parliament also assumes a 'watch dog' role with regard to the private interests of members of local authorities. Apart from the activities of audit, however, local authorities do not have established means of investigating offences other than those which require the police. Concequently, the response to allegations of misconduct can vary dramatically, depending on what individual councils consider to be the best means available of handling them.

(b) Registration

Registration is the disclosure of specified interests at regular intervals; not only at the time when a specific incident gives rise to a conflict. The second resolution of the British House of Commons in 1974 was couched in the following terms:

> "That every member of the House of Commons shall furnish to a Registrar of Members Interests such particulars of his registrable interests as shall be required and shall notify to the Registrar any alterations which may occur therein and the Registrar shall cause these interests to be entered in a Register of Members Interest which shall be available for inspection by the public". 150

The Australian Joint Committee on Pecuniary Interests of Members of Parliament in their Report on the Declaraion of Interests [151] list those interests that should be subject to registration as: The names of all companies in which Members have a beneficial interest in shareholdings, the location of any realty in which they have a beneficial interest, the names of all companies of which they are directors and any sponsored travel. Liabilities, it was recommended, need not be disclosed. Following the resolution of the British House of Commons, the Select Committee on Members Interest (Declaration) [152] provided a more comprhensive list of pecuniary interests or other benefits to be disclosed in the register. These are: Remunerated directorships of companies, remunerated employment, trades or professions, names of clients, financial sponsorships as a parliamentary candidate and as a Member of Parliament, overseas visits paid out of public funds, payments or gifts received from foreign governments or organisations, land and property from which a substantial income is derived and the names of companies in which the member, his spouse or infant children have a beneficial interest in the shareholdings of a nominal value greater than one-hundredth of the issued share capital. In this way, although a much broader area is covered, only particular interests of specified values need be recorded.

The case for a register is put by the Brisish Select Committee on Members Interests (Declaration):

> "The way would then be clear for a Member who can contribute special knowledge to a debate to do so without reservations". [153]

Moreover, registers are appreciated for their cosmetic value. The Joint Committee on Pucuniary Interests of Members of Parliament said:

> "At a time when democratic society and its institutions are under challenge in so may directions, any such restoration of faith in dedicated representatives of the people would be a wholly worthwhile achievement". [154]

A recent situation is Australia illustrates the benefits registration of interests could bring. A Minister made a decision to subdivide a region into small farms and to provide an access road to those farms through what had been a national park. Subsequent disclosure in a newspaper that the Minister and his family owned land in the area diverted public discussion away from the conservation issue which the decision had previously aroused and raised unnecessary doubts as to the reason for the decision.[155] If the fact of the Minister's interest in the area had been disclosed at an earlier date by means of a register, the issue could have been judged simply as an environmental one, as to whether or not national parks should be subdivided for farming purposes.

A further advantage may be immunisation from common law principles. In the cases of many decision makers acting with a conflict of interests, the courts do not attempt to see whether the person in question has actually been swayed by his interest; the possibility that he might have been swayed is often sufficient. However, if the subject makes a full disclosure that he has an interest conflicting with his duty, he may be able to immunise himself from the operation of those

rules. This is not to say that registration will catch every situation that might be caught by the common law rules, but it is to say that the effects of a wide conflict rule may be mitigated for, if any conflict arises, the fact that the private interest has already been disclosed makes it more difficult to say that he is acting contrary to the requirements of natural justice.

There are, however, a number of arguments that have been raised against the adoption of a register. Unlike the Joint Committee on the Pecuniary Interests of Members of Parliament who argued for a register on the basis of a restoration of public confidence, the Committee of Inquiry into Public Duty and Private Interest were opposed to its adoption.[156] The primary reasons for such a conclusion are worth setting out in full:

> "In our view, registers can do little more than present a general picture of a person's background, against which his attitude to the issues of the day can be assessed. They can also, we accept, have a part to play in isolating specific interests from an individual's participation in official business and in keeping people with impoper interest out of public life, but too much should not be built on this. The main sancion against specific conflicts of interest must be disclosure at the appropriate time and a register cannot perform this function. An individual who was determined to exploit public office for his own ends would probably be able to find some ways around any registration requirements that were not of such complexity that they would generally be

> unacceptable and unenforceable. Apart from any other considerations, registers can be expected to cover only major continuing interest; it would be impractical to require the registration of each and every business transaction." 157

Some specific disadvantages of registration can be discussed under the following heads:

Invasion of privacy There is a need to strike a balance between the public accountability of officeholders and their right to privacy in respect of their personal interests. We are primarily concerned with those affairs that may affect the execution of public duties, but it may be said that all affairs can influence an officeholders decision. As seen in the example above, a Minister's own home might be thought to influence the siting of a land use project. To hold that all organisational connections that an officeholder has are relevant to his suitability for office and should be made known in a publicly accessable register seems an unnecessary and alarming invasion of privacy. However, one may subscribe to the view that, in standing for election, of consenting to nomination for public office, officeholders place themselves in a 'glass bowl' and cannot claim to enjoy the same degree of privacy as other persons. It is submitted that the right to privacy does not form an automatic bar to the imposition of any disclosure requirements, provided that a sufficient case can be established for requiring the information: Anything relating to an officeholders public life or suitability for office is a legimate matter for public discussion, but

his private affairs (relation with family, friends, home, sexual relationships etc.) will normally be no business for the community.

Ease of evasion One witness to the Salmon committee said "if there is no honour, you cannot cultivate it". Although this does act as a reason against the benefit of requiring registration, it can be said to be outweighed by the public's right to know of the pecuniary interests of those making decisions so they can form an opinion as to what weight they should attach to those views or decisions.

Assumption of integrity impugned Advocates argue that Parliament is so infrequently troubled by conflicts of pecuniary interests that a register would call a Members integrity into doubt. This may be so if the sole aim of a register is to discover malpractices, but there are equal, if not greater purposes in registration which have been noted earlier. ie public confidence and the proper focusing of an issue.

Difficulities of definition Although lists of interests that should subject to registration have been compiled and do operate in countries such as Britain and Papua New Guinea, they do not, and cannot, achieve an accurate definition of all pecuniary interests which might be thought to affect an officeholders decison. For example, where is the line to be drawn in deciding whether particular forms of hospitality extended to an officeholder could cause a conflict?

Administrative complexity If registration is to apply to Members of Parliament, Ministerial staff, Members of statutory tribunals, local authorities and members of the judiciary (some suggest senior public servants, executives of media organisations and officials of trade unions and political parties should be included also), considerable administrative staff would be needed to verify the information, to administer it and to enforce it. The committees considering registration tended to single out Members of Parliament but, as there is considerable argument for a registration requirement apply to a wider range of public officeholders, careful consideration must be given to the machinery that must accompany such a proposal.

It is a matter for debate whether or not the personal interests of an officeholders spouse and children should be subject to registration. Because spouses enjoy more of less complete legal equality, this may be regarded as an infringement on their rights. The position of infant childrent is less clear since parental rights are exerciseable over them and their affairs. It may be that the connection is too remote to impose an obligation on infant children to make a disclosure.

Furthermore, questions arise as to what extent a register should be made available for public inspection. While the British register is accessable to the public, subject to an appointment being made at least forty eight hours in advance, the Australian proposal was that the applicant would have to establish, to the satisfaction of the Registrar, that there was a

bona fide reason for seeking access and the application might be resisted by the Member concerned. Jamacia and Papua New Guinea have registers that are not accessable to the public. In Jamacia, the information is confidential to the Integrity Commission and, in Papua New Guinea, disclosures are made confidentially to the Ombudsman Commission.

The anwer may be that, for elected officeholders, a register should be made publicly accessable, but, for appointed office-holders who are put into office by the government itself and not by the populace, the registers should be kept confidential.

Where a statutory body decides to adopt a form of registration, it would be a matter for the body itself to identify those interests which might conflict with the official duties of it members and should, as a consequence, be registered. Because of the often vast variations in the functions of statutory tribunals, a uniform set of registerable interests would be undesireable.

Despite some of the reservations that have been noted, a number of countries have adopted forms of registration. In 1965, in the United States of America, President Johnson issued Executive order 11222. This required senior state servants and members of presidential committees, boards and commissions to lodge statements with the Civil Service Commission disclosing their own interests and those of their spouses and minor children. Registration of the interests of members of Congress was most recently upgraded by the Ethics in Government Act 1978. This lays down a uniform system of annual registration of private interests with provision for public access for the three branches

of government. The Act also established the Office of Government Ethics to develop rules on the conflict of interests and to monitor and investigate federal ethics laws as well as providing for the appointment of a special prosecutor to investigate criminal allegations against high level government officials.

In Canada, the Newfoundland Conflict of Interest Act 1973, requires the registration of financial interests of members of the House of Assembly, members of statutory bodies, their spouses and children. The British Columbia Public Officials and Employees Disclosure Act requires registration of personal interests by members of the Provincial Parliament, public servants, local government officials both elected and appointed and by candidates for elected office both at the provincial and local government levels. Shareholdings, sources of remuneration, creditors and real property are to be indentified.

To conclude, it should be noted, with some dismay, that the effects of the registration requirements in Britain have been minimal. Since 1975, two Parliamentary Papers setting out the details of the interests registered have been published. The refusal of one member to provide information led the Select Committee charged with the responsibility for oversight of the register to decline to publish any subsequent papers until the House made compliance mandatory. This has not happened and the register has not been published since May 1976, although many members have continued to update their own entries.

(C) Divestment

Divestment is the disposal, either permanently or temporarily of an interest which creates or may be thought to create conflict with public duty. This mechanism forms the basis of the New Zealand Ministers Private Interest Committee Report [158]. Principles (1) to (5) require the resignation of directorships, the avoidance of speculative investments and the cessation of routine work in a professional practice or in a Member's own business.

With regard to statutory tribunals, the Salmon Committee recommended that, as part of a member's qualifications for appiontment, the responsible Minister should obtain from the nominee, explicit confirmation that he does not currently hold any interests that conflict or which may appear to conflict with the duties of the office and should secure an undertaking that the member will divest himself of such interests should he subsequently come into possession of them. Blanket rules as to the types of interest that should be divested for members of statutory tribunals would be inappropriate but may, with some profit, be included in the statutory provisions constituting a tribunal whose inpartiality can be regarded as essential.

The example has already been provided of the Electoral Act 1956 which prohibits a Member of Parliament from holding any other office in the public service. Other examples may be viewed: Section 17 of the Public Finance Act 1977 prohibits the Controller and Auditor-General from being a Member of Parliament or of a local authority or from holding any office of trust or

profit or from engaging in any occupation for reward outside the duties of his public office. Section 5 of the State Services Act 1962 provides that a State Services Commissioner shall be deemed to have vacated his office if he engages in any paid employment or business other that the duties of his office or accepts appointment to any other office or position in the State Services.

Alternately, Parliament may expressley allow an officeholder to engage in outside employment while still reserving a right to prohibit such employment if it is considered undesireable. Section 7 of the Small Claims Tribunal Act 1976 allows a Referee to hold another office or engage in any other employment or calling unless the Governor-General considers that the proper discharge of the functions of a Referee will be impaired thereby.

For temporary divestments, the United States of America employs two devices: A blind trust may be imposed. Here, a trustee controls the interests of an officeholder so as to preclude the officeholder from knowing whether he still has certain interests or not. Alternately, a frozen trust may be imposed. If this is the case, the officeholder is forbidden to buy or sell any interests he may have and consequently, has less opportunity to misuse official information.

In 1973, the Canadian Prime Minister laid down guidelines offering his Ministers the choice between either permanently divesting themselves of their business interests or placing them in trust. Either a blind trust or a frozen trust were acceptable but Ministers were urged to select a trustee who could be seen to be

at arms length from the Minister. [159] If this latter point were made to be a requirement, it would derve to dispell the reservations held by the Salmon Committee that such trusts may act as a facade behind which the conflict of interest would continue to survive.

(d) Disqualification

Disqualification is the avoidance by breaking, permanently or temporarily, the connection between the officeholder and the interest which creates a conflict by removing him from his office or duties in the conflict situation. Discussion has already been directed to disqualification and its effects in the previous section of this paper, but, in the light of the options presented here, disqualification should only be appropriate when there is so close an association between the interests and the officeholder's responsibilities that the other options are not appropriate.

3. A Code of Conduct

The principles discussed thus far are particular means of ensuring the observence of general principles regarding conduct in public office and the avoidance of conflicts of interest. Attempts have also been made to formulate general statements as to ethics and practices to be observed by all categories of officeholders. The Australian Committee into Public Duty and Private Interest drafted a code embodying such principles. (This is reproduced in the appendix of this paper.) The code begins by asserting general principles - an officeholder should perform his duties impartially, should be frank and honest in

his official dealings and should avoid situations where his private interests conflict or might reasonably be thought to conflict with his public duty and goes on to set out guidelines as to disclosure, divestment and authorisation from colleagues to continue to discharge the duties in question and as to the avoidance of corrupt practices, such as the acceptance of outside pecuniary advantages for the misuse of official information or for the discharge of his public duties. The New Zealand Ministers' Private Interests Committee provided two such general statements in relation to Ministers of the Crown. (This is also set out in the Appendix of this paper.)

It would be of much profit to ratify such a code in single statute. Such a code would take the form of a statement of general principles and sepcify the need for mechanisms such as declaration and, if thought necessary, registration. These general principles do not encroach upon the individuality of any particular officeholder or public body. Individual mechanisms for ensuring the operation of these rules and for adapting them to suit the particular needs of the officeholder/s in question can be formulated in the particular statute constituting the body in question. It may be that the suggested Australian code goes too far in prohibiting any outside employment by the officeholders it applies to. This may be appropriate in some cases, as is often recognised in statute but this cannot be the case for members of all tribunals for a great number of them operate only in a part-time basis.

To maintain flexibility, it would be beneficial to leave the avoidance, resolution and enforcement functions to the existing disciplinary procedures of the various categories of office-holders:

- A Minister would be liable to private or public reprimand by the Prime Minister, a demotion to a less important portfolio or a request that he resign, or-else his commission will be terminated by the Governor-General.

- A Member of Parliament would be liable to censure by the chamber or to expulsion.

- A Public Servant would be liable to transfer, dismissal or to a reduction in salary.

- A statutory officeholder would be liable to either private or public reprimand by the Chairman of the Statutory body or by the responsible Minister or to removal from the office by the appropriate procedure.

There is, however, the countervailing consideratin that tribunals should be established with some degree of independence so as to distance them from Ministerial control. If a member is subject to discipline by a Minister of the Crown, that notion of independence begins to break down, both inreality and in the public eye. Ministerial intervention, then, should only follow if the internal disciplinary procedures of a tribunal cannot resolve a conflict.

Rules of conduct cannot create honesty, nor can they prevent deliberate, dishonest or corrupt behaviour. Rather, they are a framework of reference, embodying uniform minimum standards. Their special value is in situations which are intrinsically compilcated, or are new to the individual concerned. Here they provide a substitute to working out the right course of action from first principles on each occasion.

F. CONCLUSION

The courts of law have recognised and ruled upon many forms of interest that can give way to bias. Legislatures and special committees have identified and sought to regulate an equal number. The essential questions are always what are the general interests that are seen as being bad ones and what tests or standards should be adopted in order to determine whether that interest gives way to an operative bias in practice, in appearance or both? The law has been concerned with two different kinds of interest. The first is the private interest of individuals. These the law will not tolerate if they cause of could be seen to cause a conflict of interest. The second is a form or interest that stems from the very nature of the office in question. It can be a political interest or an interest arising out of the dual role that a body must, of necessity, play in the decision making process. It is often the case that the legislature expressley permits a body to pursue extensive negotiations as to a development as well as to hear any objections to that development, which the body itself favours. It is often the case that a private association requires of its members an active role in its day to day operations. At the same time, it may require some of them to judge the conduct of members they know well, with a view to their possible expul-

sion from that

association. These types of interest the law may tolerate but only to the point that they do not preclude the ability to consider alternative arguments; the ability to take into account the relevant statutory, or other, criteria.

The private interests of individual officeholders can, of themselves, be divided into two categories: Those that are the result of a voluntary act on the part of the officeholder concerned and those that are not attributable to an overt act, but arise out of an officeholder's private activities. Both are forms of interest, both can be prevented by the officeholder himself but each may have a different consequence at law.

Overt acts that give rise to bias through interest include the taking of a bribe and actively using a position of influence to promote one's private interests or the interest of family or associates. Actions such as these may be collectively described as corruption. They present no doubt as to an officeholder's motives and as to his ability to decide according to law. Not only will an action or decision that was spurred by corruption be rendered invalid but the officeholder himself will be liable to suffer the consequences. These may be, at least, a private or public reprimand and, in the most blatent cases, dismissal from office. The example may be taken of the Marginal Lands Board Loan Affair. The Commission of Inquiry was primarily instructed to determine whether ther was any impropriety on the part of any person inrelation to the loan application. Specifically, the active participation in the dispute of Ministers of the Crown beyond their call of duty was in issue. The clearance of the Ministers concerned in that case was largely a result of the

standard of proof adopted by the Commission. It may be that the criminal standard that was applied is necessary when such important private interest are involved but the possibility of corruption existing in public office is a serious reality that must be carefully guarded against. Although a remedy was not included in the Commission's terms of inquiry, an unfavourable finding would almost certainly have resulted in the resignation of the Ministers concerned.

An interest that is not the result of an overt act but arises out of an officeholder's private interest places no blame on the officeholder himself but may render his decision invalid for want of an appearance of impartiality. This category of interest speaks primarily to a financial interest in the subject matter for adjudication or a personal relationship or association with a party to a dispute. This relationship or association may be seen as favourable to a party concerned or a counting against an impartial consideration of his case. Mahon J, in Anderton v Auckland City Council [160] provided one of the most recent and comprehensive analyses of this area of the law of bias. The learned judge saw that where pecuniary or other interests were in issue, the question a court will ask is whether an impartial observer, apprised of all relevant facts, would consider a real likelihood of bias to exist. Where the alleged interest arises out of the manner in which the proceedings were conducted, the court will judge whether a reasonable suspicion of bias may be created on the mind of an observer unacquainted with outside facts or circumstances. This second test is applicable, for example, in cases where an officeholder has, during a hearing or consideration of a case, made a pronouncement as to the guilt

or innocence of a party to the dispute or has retired with a person having an interest in the outcome of the adjudiction.

In either of these cases, an adverse finding by a reviewing court will see the decision of the officeholder in question as being voidable or void without a ruling on that officeholder's propriety. It may be, however, that where the tribunal objected to as interested is the only tribunal which can deal with the subject matter, where the inclusion of an interested member on a tribunal is necessary to form a quorumor where the legislature had directed the interested tribunal to decide, the 'doctrine of necessity' will act as a bar to a successful claim of bias.

Parliament too has, albeit in a piecemeal way, formulated a number of statutory privisions designed to regulate conflicts of interest in particular public officeholders and to specify the consequences if such an interest is found to exist.

In bodies where a particular interest will not render a member intereseted in every matter that comes before it but only causes him to have an interest in a particular case, Parliament may require him to disclose that interest to his colleagues or to stand down from or abstain from voting in that case. If the interest in question will have a continuing effect on the duties of a public office, Parliament may preclude such a person from being appointed to that office. If a person holding public office subsequently acquires a conflicting interest, he may, by statute, be automatically disqualified from that office. It may be that the exclusion of stated interests in a public office is so absolute that a fine may be imposed on an officeholder acting in contravention of Parliament's

direction. An example is provided by section 5 of the Local Authorities (Members' Interest) Act 1968.

In furtherance of more uniform rules and standards, governments, particularly in England and Australia, have established committees of inquiry to identify those interest that might give rise to a conflict and to suggest means for regulating these interests. Agreed responses include those already identified: Declaration if an interest will cause a conflict in a particular case and either divestment of the interst or disqualification of the officeholder if the interest will cause a conflict on an on-going basis. The means of regulation that has spurred most debate is the compulsary registration by all or selected categories of officeholders of specified private interests. Not only would registration bring any ulterior motives immediately to light without relying on an officeholder's own sense of public responsibility but it would go far to restore public confidence in the government and its many arms. Some resistance is provided by those forwarding an officeholder's right to privacy and speculating on the ease with shich registration could be evaded and the effects it could have on an officeholder's integrity. Although there is some merit in these views, as we move towards open government, should we not also be promoting the openness of those who govern?

The second major type of interest that has been a major source of concern and litigation is that which stems from the nature of the office in question and not from the voluntary acts or private activities of a particular person. The inevitability of certain appearances of bias existing has often been given

as a reasonfor the inapplicability of the judicial tests of a real likelihood or reasonable suspicion of bias. It is inevitable that members of a statutory tribunal who are selected from a body upon which they will adjudicate will have a prior involvement with the subject matter or litigants of a case, thereby promoting an appearance of partiality. It is inevitable that a local authority will have pursued negotiations with certain developers before hearing objections to their proposal, thereby raising suspicious as to the motives for their decision. It is inevitable that Ministers of the Crown will openly pursue government policy when deciding on a particular case or project, thereby giving rise to an appearance of predetermination. It is inevitable that certain members of a private club or association will also hold polsitions on its governing body and will adjudicate upon the propriety of its members, thereby negating an appearance of detached impartiality.

Interests such as these will be tollerated to a point. The state of impartiality which is required is a capacity to preserve a freedom, not-withstanding earlier investigations, decisions, or involvement, to approach the determination of and issue without a closed mind so that alternative arguements may be rationally considered and, if substantiated, can cause officeholders to go back on their proposals. The test adopted to gauge such impartiality has repeatedly been actual predetermination of the adjudicated question. Variations may ensue when account is taken of the further variable of the type of power involved and the effect it can have on personal or

property rights. The case of Rigg [161] illustrates that, notwithstanding an amount of prior involvement with the subject matter of a case, when important personal rights, such as the right to employment, are at stake, a test that is harder to satisfy may be imposed. The test adopted in the Rigg case was a combination of those identified thus far: Whether the informed observer would consider that the officeholders had closed their minds ie. The appearance of bias must lead an observer to think the officeholder is biased and not merely create a suspicion to that effect in his mind.

Questions arise as to the right of the courts to adjudicate on the propriety of members of private, voluntary organisations or clubs. The response, provided by the Daganayasi case [162] is that a court will not only intervene in cases where the decision maker has the authority to affect a person's rights but also in cases where a legitimate expectation has been created in the mind of an affected party that his case will be heard according to law. As in the Rigg case, the rights that are affected by non-statutory disciplinary bodies are important ones. To ensure that justice is seen to be done to a party for whom a decision may have serious concequences, a test of an appearance of bias has become prevalent.

It is then a case of weighing the necessity of the interest, so as not to fetter the ability of an officeholder to carry out his duties, against the rights of parties to a decision to have their case determined in an impartial way. It is often true that the harsher the effect a decision will have on private rights, the more willing the courts are to detect

an operative bias.

In recognition of the difficulties presented by a body that, by its nature, is inherently biased, Parliament has, in several instances, intervened by way of legislation to remove such an appearance and to make for a more impartial decision making process in practice. The typical form this legislative intervention takes is the creation of another body or office-holder so that they may assume one of the inherently biased body's roles. Objections to street stopping are now heard by the Planning Tribunal and not the local authority fowarding the proposal.[163] An Investigations Committee determines whether a complaint is of sufficient substance to be forwarded to the Dental Council so as to preclude the Council assuming investigatory and adjudicatory roles.[164] A Proceedings Commissioner decides whether proceedings before the Equal Opportunities Tribunal are warranted so as to preclude the Human Rights Commission from investigating a matter as well as deciding whether proceedings are warranted and 'prosecuting' the case before the Equal Opportunities Tribunal.[165] The involvement of an increased number of independent bodies in a decision making process goes far to preserve in the public eye, and inpractice, the integrity of each. Concequently, their effective operation will reduce the amount of litigation that flows in their absence.

In a haphazard way, the courts, legislatures and public committees established to deal with particular instances of impropriety and with conflicts of interest in general have all

contributed to setting in place a set of rules and standards to be adhered to by those holding public and private office. There rules and standards are scattered throughout case law, statutes, Parliamentary papers and public reports. The variation in their responses is attributable to the range of variables that come into play when dealing with such a wide category of officeholders. It is as a result of these variables that certainty in this area of the law cannot be readily attained. Of some concern is the accessability of the rules and standards that have ensued. Adherence to these standards and public conficence in decision making processes can only be attained if the governing rules are specificially brought to the attention of the officeholders they concern and to the attention of those their decisions will affect; for wisdom comes only through knowledge.

FOOTNOTES

1. The Association of the Bar of the City of New York Special Committee on the Federal Conflict of Interest Laws. Conflict of Interest and Federal Service. Harvard University Press. Cambridge, Massachusetts (1960).

2. As defined in s.99 of the Crimes Act 1961.

3. Inland Revenue Department Act 1974, s.31.

4. Penal Institutions Act 1954, s.21B.

5. Sale of Liquor Act 1962, s. 20(3).

6. A complaint under the Broadcasting Act 1976, s.95o. The matter will go first to the Broadcasting Complaints Committee and, if the complainant is not satisfied with the decision, s/he may refer the matter to the Broadcasting Tribunal under s.67(1)(b).

7. Carltona v Commissioner of Works 1943 2 All ER 560.

8. Crimes Act 1961 ss. 99-106

9. See for example Fisheries Act 1983, s.14 and Local Authorities (Members' Interests) Act 1968, s. 3(1).
10. See, for example Police Act 1958, s.46.

11. 4 Bracton De Legibus Et Consuetudinibus Angliae. (Woodbine's ed 1942) 281.

12. Co Litt 141a.

13. 3 Bl. Comm. 361.

14. 8 Co. 107a, 77 Eng Rep. 638 (K.B.1608)

15. Anon, per Halt CJ, 1 Salk 369, 91 Eng Rep 343 (K.B.1698).

16. Between the Parishes of Great Charte and Kennington." Strange 1173, 93 Eng. Rep. 1107 (K.B. 1726)

17. 16 Geo II, c18 sec. 1 (1743) and, for a modern example of this authorisation, see s. 130(5) of the Town and Country Planning Act 1977.

18. Pollock, First Book of Jurisprudence (6 ed. 1929) 270.

19. 1 Hardes 503, 145 Eng. Rep. 569 (Ex. 1668).

20. Vernon v Manners. 2 Plowden 425, 75 Eng. Rep. 639 (K.B. 1572).

21. (1852) 3 HLC 759, 10 ER 301.

22. Ibid at p. 793.

23. [1924] 1KB 256.

24. (1866) LE 1Qb 230.

25. (1901) 2 KB 357, and was also expressly adopted in Frome United Breweries Co v Bath Justices [1926] AC 586.

26. [1958] NZLR 945.

27. [1960] 2 QB 167.

28. Ibid at p. 187.

29. [1964] NSWR 446, 454.

30. Metropolitan Properties co (FGC) ltd. v Lannon 1969 1 QB 577.

31. Ibid at p. 599.

32. (1969) 122 CLR 546.

33. There may be some doubt as to the suitability of the test adopted in the Angliss case. Given the fact that the Commission must, of necessity, have some prior involvement with the subject matter of any case, a tougher test such as actual bias may be more appropriate. This will be brought out in the dicussion of Turner v Allison and cases following.

34. Review of Administrative Action. Sweet and Maxwell (NZ) Ltd. WEllington (1978).

35. [1955] 1 QB 41.

36. [1970] 1 WLR 937.

37. Administrative Law (5 ed.) Oxford University Press. (1982).

38. [1978] 1 NZLR 657.

39. However. a line must be drawn between genuine and fanciful cases eg. In R v Deal Justices (1881) 45 L.T. 439, it was held that a Justice is not disqualified, merely because he subscribes to a society for preventing cruelty to animals, from hearing a prosecution instituted by the society.

40. D.J. Mullan. Was Justice Really Seen to be Done? (1969) 3 NZULR 440.

41. Supra No. 24.

42. R vHain Licencing Justices (1896) 12 TLE 323.

43. [1892] 2 QB 519.

44. Its effect on administrative Tribunals may be a little different in light of the Marginal Lands Board Loan Affair, which will be examined later.

45. [1939] 2 All ER 535, 539.

46. R (Donoghue) v Cork County Justices. [1910] 2 IR 271.

47. (1953) SR (NSW) 163.

48. [1951] AC 585.

49. [1904] 2 IR 75.

50. (1893) 11 NZLR 244.

51. [1892] 1 QB 190.

52. 71 SR (NSW) 291.

53. R v Optical Board of Registration, ex parte Qurban 1933 SASR 1.

54. Supra No. 36.

55. (1960) 24 DLR (2d) 119.

56. [1967] NZLR 1057.

57. See, for example, Wade, Supra No. 37 at p. 439.

58. Judicicial Review of Administrative Action (4 ed. 1980) at p. 274.

59. (1984) 10 NZTPA 53.

60. See, for example, s. 95(5) of the Broadcasting Act 1976.

61. [1969] 2 AC 147. See also South East Asia Fire Bricks Sdn Bhd v Non Metallic Mineral Products Manufacturing Employees Union [1980] 2 All ER 689

62. Lon L. Fuller. Anatomy of the Law. Praeyer. (New York) 1968.

63. [1926] AC 586, 590.

64. [1924] 1 KB 171.

65. [1964] AC 40.

66. [1967] 2 AC 337, 349.

67. [1918] 2 NZLR 130.

68. [1972] 1 WLR 534; 1972 2 All ER 6

69. [1972] 2 QB 229; 1972 2 All ER 589

70. Supra No. 68 at 547; 17

71. Supar No. 69 at 301; 596

72. [1974] 1 NZLR 545

73. Ibid at p. 549

74. Robert F Reid and Hillel David. Administrative Law and Practice. (2 ED) Butterworths. Canada (1878)

75. Supra No. 37

76. Small Claims Tribunals Act 1976, s.15

77. Ibid s. 16 (1)

78. Ibid s. 17.

79. Broadcasting Act 1976, s.67.

80. Ibid s.68.

81. Ibid s.84(3).

82. Ibid s.67A.

83. Treaty of Waitangi Act 1975, 2. 6(1).

84. Ibid s. 6(3).

85. Education Authorities Employment Regulations 1982 cl. 32.

86. Electoral Act 1956, s. 15.

87. Motor Vehicle Dealers Act 1974, s. 63.

88. State Services Act 1962, s. 61.

89. Legal Aid Act 1964 s. 4.

90. Supra. No. 86.

91. Law Practitioners Act 1982, s. 103.

92. Town and Country Planning Act 1977, s. 129.

93. Co-operative Diary Companies Act 1949, s. 17.

94. Hotel Association of New Zealand Act 1964, s. 4.

95. [1894] 1QB. 750 (CA).

96. [1970] 2 OR 438, 11 DLR (3d) 148.

97. [1971] NZLR 833.

98. Ib id at p. 849.

99. [1984] 1 NZLR 149.

100. Ibid at p. 222.

101. (1963) DLR (2d) 113.

102. [1974] 1 NZLR 545.

103. Ibid at p. 550.

104. [1978] 1 NZLR 657.

105. Ibid at p. 696.

106. See, for example, Reid and Daniel, Supra No. 74 at p. 252 and R v Justices of Queens County 1908 2 Ir.R. 285.

107. [1979] 2 NZLR 385.

108. Ibid at p. 426.

109. [1952] 2 QB 413.

110. Nigel Fyfe. Councils, Planning and Bias: Attorney General ex relatione Benfield v Wellington City Council. (1980) 10 VUWLR 453, 472-3.

111. Supra No. 74 at p. 242.

112. See the Local Government Amendment Act 1978, which amends the 6th Schedule to the Municipal Corporations Act.

113. The USA has the Ethics in Government Act 1978. In Canada, Newfoundland has the Conflict of Interest Act 1973 and British Columia has the Officials and Employees Disclosure Act. Resolutions of the British House of Commons in 1974 provide for the declaration and registration of members' interests. Papua New Guinea has its Leadership Code.

114. [1948] AC 87 (HL).

115. [1981] 1 NZLR 173.

116. The plaintiffs took no chances with the test but still failed to choose the correct one, given the nature of the decision maker concerned.

117. Supra No. 115 at p. 194.

118. Supra No. 21.

119. 'Improper' being the key word in the Commissions terms of reference.

120. Report of the Commission of Inquiry into the Marginal Lands Board Loan Affair at p. 46.

121. Ibid at p. 48.

122. The Marginal Lands Board Affair F.M. Brookfield. [1981] NZLJ 96, 103.

123. Supra No. 58 at p. 256.

124. [1978] NSWLR 161.

125. (1948) 77 CLR 601.

126. [1967] 1 WLR 532.

127. Note Lord Reid's comments on the inapplicability of the rules of natural justice to positions held at pleasure in Ridge v Baldwin [1948] AC 40, 65.

128. Supra No. 126 at p. 546.

129. Another such case is Attorney General and Robb v Mount Roskill Borough and Wainwright 1971 NZLR 1030, see p. 1044.

130. (1972) 128 CLR 509.

131. [1961] NZLR 785.

132. R.R.S. Tracey. Bias and Non-Statutory Administrative Bodies - A Wrong Turning (1983) 57 ALJ 80, 86.

133. As Fyfe (Supra No. 110) argues at p. 473.

134. Under the New Zealand Official Information Act 1982, the Ombudsman assumes the same role as the Canadian Information Commissioner. The Ombusdman is to conduct investigations in the same manner as under the Ombudsman Act. There is no provision for the Ombudsman to take a matter he has investigated to court.

135. Such as collective pricing agreements and individual resale price maintenance agreements.

136. Commerce Act 1975, s. 40.

137. Ibid s. 41.

138. Dental Act 1963, s. 34.

139. Ibid, s. 35.

140. Ibid. s. 36.

141. Which does not go as far as to require the Commission to decide whether there has been a breach of the provisions of the Act.

142. Which is the judicial test used in Canada.

143. 11 DLR (4th) 202.

144. Supra No. 1 at p. 17.

145. Public Duty and Private interest. Report of the Committee of Inquiry Australian Government Publishing Service. (1979).

146. Alan Doig. Corruption and Misconduct in Contemporary British Politics. Penguin (NZ) 1984.

147. Royal Commission on Standards of Conduct in Public Life. C.B. 1974-76.

148. Appendix to the Journal of the House of Representatives 1956 I.17; 310 NZ Parliamentary Debates 2787-88.

149. See Erskine May. Parliamentary Practice. Sir Charles Gordon KCB (ed.) at pp 435-7.

150. Ibid.

151. 1975. Parliamentary Paper No. 182. (Riodan - Chairman).

152. HMSO. London 1969.

153. Ibid at p. XIV.

154. Supra No. 151 at p. 21.

155. As conveyed in: Report on the Delaration of Interest. Joint Committee on Pecuniary Interest of Members of Parliament. (1975) Parliamentary Paper No. 182 at p. 17.

156. Supra No. 145.

157. Ibid at p. 48.

158. Supra No. 148.

159. Canadian House of Commons Debates 18 July 1973. pp 5735-6.

160. Supra No. 104.

161. Supra No. 99.

162. Supra No. 67.

163. Supra No. 112.

164. Dental Act 1963, s. 34.

165. Human Rights Commission Act 1977, s. 37 (1) to (3).

APPENDIX

A. Code of Conduct Recommended by the Australian Committee of Inquiry into Public Duty and Private Interest.

4.9 The Committee *recommends* that the following Code of Conduct be adopted for general application to all officeholders:

CODE OF CONDUCT

Under the system of government which operates in Australia the main legislative and executive functions of government are carried out by Ministers, Members of Parliament, public servants and statutory officeholders. Each category of officeholder has a duty to discharge responsibilities entrusted by the Constitution and the laws made under the Constitution according to the highest standards of conduct. The public is entitled to have confidence in the integrity of its government. Officeholders may be required by the nature of public office to accept restrictions on certain areas of their private conduct beyond those imposed on ordinary citizens.

The following Code of Conduct embodies principles which should be observed by all four categories of officeholders.

1. *An officeholder should perform the duties of his office impartially, uninfluenced by fear or favour.*
2. *An officeholder should be frank and honest in official dealings with colleagues.*
3. *An officeholder should avoid situations in which his private interest, whether pecuniary or otherwise, conflicts or might reasonably be thought to conflict with his public duty.*
4. *When an officeholder possesses, directly or indirectly, an interest which conflicts or might reasonably be thought to conflict with his public duty, or improperly to influence his conduct in the discharge of his responsibilities in respect of some matter with which he is concerned, he should disclose that interest according to the prescribed procedures. Should circumstances change after an initial disclosure has been made, so that new or additional facts become material, the officeholder should disclose the further information.*
5. *When the interests of members of his immediate family are involved, the officeholder should disclose those interests, to the extent that they are known to him.* Members of the immediate family will ordinarily comprise only the officeholder's spouse and dependent children, but may include other members of his household or family when their interests are closely connected with his.
6. *When an officeholder (other than a Member of Parliament) possesses an interest which conflicts or might reasonably be thought to conflict with the duties of his office and such interest is not prescribed as a qualification for that office, he should forthwith divest himself of that interest, secure his removal from the duties in question, or obtain the authorisation of his superior or colleagues to continue to discharge the duties.* Transfer to a trustee or to a member of the officeholder's family is not a sufficient divestment for the purpose. If immediate divestment would work significant hardship on the officeholder, possession of the interest should be disclosed to colleagues or superiors and authorisation obtained for temporary retention pending divestment.
7. *An officeholder should not use information obtained in the course of official duties to gain directly or indirectly a pecuniary advantage for himself or for any other person.* In particular, an officeholder should

scrupulously avoid investments or other transactions about which he has, or might reasonably be thought to have, early or confidential information which might confer on him an unfair or improper advantage over other persons.

8. *An officeholder should not:*
   (*a*) *solicit or accept from any person any remuneration or benefit for the discharge of the duties of his office over and above the official remuneration;*
   (*b*) *solicit or accept any benefit, advantage or promise of future advantage whether for himself, his immediate family or any business concern or trust with which he is associated from persons who are in, or seek to be in, any contractual or special relationship with government;*
   (*c*) *except as may be permitted under the rules applicable to his office, accept any gift, hospitality or concessional travel offered in connection with the discharge of the duties of his office.*

   The impression should be avoided that any person can improperly influence the officeholder or unduly enjoy his favour.

9. *An officeholder should be scrupulous in his use of public property and services, and should not permit their misuse by other persons.*

10. *An officeholder should not allow the pursuit of his private interest to interfere with the proper discharge of his public duties.*

B. Principles Forming the Basis of the New Zealand Members' Private Interests Committee Report.

Basic Principles Which Should be Observed by Holders of Ministerial Office Under the Crown in the Reconciliation of Their Public Duties and Private Interests

A. BASIC PRINCIPLES

1. *A Minister must ensure that no conflict exists, or appears to exist, between his public duty and his private interests*

This principle should be observed by a Minister in the arrangement of his private affairs on assuming office under the Crown, and while he continues to hold office he should not allow a situation to arise in which his personal or private interests interfere with the proper performance of the duties of his office.

In the application of the principle the conflict of interest must be sufficiently direct and substantial to exert or appear to be likely to exert an influence on the impartial performance of public duties.

2. *A Minister of the Crown is expected to devote his time and his talents to the carrying out of his public duties*

Subject to reasonable reservations for personal affairs and family life a Minister should give his attention to the carrying out of the duties of his office without the distraction of other active or competing interests.

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